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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

CHESHIRE MEDICAL CENTER,

Petitioner,

v.

W.R. GRACE & CO. AND W.R. GRACE & CO.-CONN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. In determining whether or not an objection to an instruction is sufficiently specific under Rule 51 of the Federal Rules of Civil Procedure, may a federal Court of Appeals totally disregard the District Court's decision that the objection "properly preserved" the issue or is this decision entitled to at least some deference?

2. May the federal Courts of Appeal apply a "plain error" exception to Rule 51 of the Federal Rules of Civil Procedure and, if so, does a Court of Appeals have the discretion to refuse to review for plain error an instructional error the District Court admittedly made and concluded was properly preserved after the appellate court reviews for plain error another instruction both it and the District Court agreed was not properly preserved?

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

The parties to the proceeding are the petitioner, Cheshire Medical Center, and the respondents W.R. Grace & Company and W.R. Grace & Company-Conn.

The Cheshire Medical Center ("Cheshire"), a non-profit hospital incorporated in the State of New Hampshire, has no parent organization. Its partially owned subsidiaries are: the Connecticut Medical Insurance Company Risk Retention Group, New Hampshire Imaging Services, New Hampshire Lithotripsy, and Monadnock Sports Medicine. Cheshire also has entered into non-profit joint ventures with the Behavioral Health Network and the Unified Health Alliance, and is a member of the for-profit VHA-NE cooperative.

TABLE OF CONTENTS

Page(s)

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

FEDERAL RULE INVOLVED IN THE CASE 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 8

I. The Repeatedly Declared Purpose of Requiring Specific Instructional Objections Shows That Deference Is Owed To A District Court's Decision That An Objection "Properly Preserved" The Claimed Error 8

II. In A Criminal Case, This Court Deferred To A District Court's Conclusion That Instructional Objections Properly Preserved The Error 10

III. Certiorari Is Necessary To Resolve The Circuit Split On Whether Plain Error Review Of Instructions Is Available In Civil Cases 11

IV. Certiorari Is Necessary To Determine What, If Any, Limits Exist On The Courts Of Appeals Discretion To Review For Plain Error In Civil Appeals 14

CONCLUSION 18

TABLE OF AUTHORITIES

Page(s)

CASES:

American Hoist & Derrick Co. v. Sowa & Sons, Inc., 725 F.2d 1350 (Fed. Cir. 1984), *cert. denied*, 469 U.S. 821 (1984) 13

Beaver v. Taylor, 93 U.S. 46 (1876) 8

Bertrand v. Southern Pacific Co., 282 F.2d 569 (9th Cir. 1960), *cert. denied*, 365 U.S. 816 (1961) 12

Brochu v. Ortho Pharmaceutical Corp., 642 F.2d 652 (1st Cir. 1981) 16

Chellman v. Saab-Scania AB, 138 N.H. 73, 637 A.2d 148 (1993) 5, 6, 16

Cheshire Medical Center v. W.R. Grace & Co., 853 F. Supp. 564 (D.N.H. 1994) ..... *passim*

Cheshire Medical Center v. W.R. Grace & Co., 49 F.3d 26 (1st Cir. 1995) ..... *passim*

City of Newport v. Facts Concerts, Inc., 453 U.S. 247 (1981) 12, 15

Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990) 9

Deppe v. Tripp, 863 F.2d 1356 (7th Cir. 1988) 12

Hammer v. Gross, 932 F.2d 842 (9th Cir. en banc), *cert. denied*, 502 U.S. 980 (1991) 12

Hebron v. Touchy, 18 F.3d 421 (7th Cir. 1994) 12

Hicks v. United States, 150 U.S. 442 (1893) 10, 11

Highlands Ins. v. National Union Fire Ins., 27 F.3d 1027 (5th Cir. 1995), *cert denied*, 513 U.S. ___, 115 S.Ct. 903, 130 L.Ed.2d 786 (1995) 15

TABLE OF AUTHORITIES – Continued

Page(s)

Hobson v. Wilson, 737 F.2d 1 (1984), *cert. denied*, 470 U.S. 1984 (1985) 13

Jordan v. United States Lines, Inc., 738 F.2d 48 (1st Cir. 1984) 12

Lear v. Equitable Life Assurance Society of the United States, 798 F.2d 1128 (8th Cir. 1986), *cert. denied*, 479 U.S. 1066 (1987) 2

Lusby v. T.G. & Y Stores, Inc., 796 F.2d 1307 (10th Cir.), *cert. denied*, 479 U.S. 884 (1986)..... 13

Memphis Community School District v. Stachura, 477 U.S. 299 (1986) 9

Morris v. Getscher, 708 F.2d 1306 (8th Cir. 1983) 13

O'Brien v. Willys Motors, Inc., 385 F.2d 163 (6th Cir. 1967).....13, 15

O'Neal v. McAninch, 513 U.S. ___, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995)..... 16

Palmer v. Hoffman, 318 U.S. 109 (1943)..... 8

Pate v. Seaboard Railroad, Inc., 819 F.2d 1074 (11th Cir. 1987) 13

Pennsylvania Railroad Company v. Minds, 250 U.S. 368 (1919)..... 9

Pritchard v. Liggett & Myers Tobacco Co., 350 F.2d 479 (3rd Cir. 1965), *cert. denied*, 382 U.S. 987 (1966).....13, 15

Rodrigue v. Dixilyn Corp., 620 F.2d 537 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981).... 13, 15, 16

Rush v. Smith, 56 F.3d 918 (8th Cir. en banc. 1995) 15

Sharp v. Root, 240 F.2d 519 (5th Cir. 1957)..... 3

TABLE OF AUTHORITIES – Continued

Page(s)

Shokuwan Shimabukuro v. Higeyoshi Nagayama, 140 F.2d 13 (D.C. 1944), *cert. denied*, 322 U.S. 755 (1944) 13

Smith v. Gulf Oil Co., 995 F.2d 638 (6th Cir. 1993) 15

Stewart v. Hall, 770 F.2d 1267 (4th Cir. 1985) 13

Sunkist Growers v. Winckler & Smith Co., 370 U.S. 19 (1962) 9

Swiderski v. Moodenbaugh, 143 F.2d 212 (9th Cir. 1944) 3

Transnational Corp. v. Rodio & Ursillo, Ltd., 920 F.2d 1066 (1st Cir. 1990) 2

Und Commerz Union Austalt v. Collector's Guild, 930 F.2d 1021 (2d Cir. 1991) 13

United States v. Olano, 507 U.S. ___, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993) 14, 15, 17

Wilton v. Seven Falls Co., 515 U.S.___, 115 S.Ct. 2137, 132 L.Ed.2d 214 (1995) 10

Winstead v. Hildenbrand, 159 F.2d 25 (D.C. Cir. 1947) (per curiam) 3

STATUTES:

28 U.S.C. §1254(1) 1

28 U.S.C. §2101(c) 1

RULES:

Federal Rules of Civil Procedure Rule 51 ..... 1, 5, 6, 9, 10, 12, 13

Federal Rules of Criminal Procedure Rule 52(b) .. 12, 14

TABLE OF AUTHORITIES – Continued

Page(s)

Supreme Court Rule 10.1(a) 14

Supreme Court Rule 10.1(c) 10, 11, 17

Supreme Court Rule 13.4 1

OTHER AUTHORITIES:

Restatement (Second) of Torts, §402A 6

Wright & Miller Federal Practice & Procedure, Civil 2d §2554 (1994) 10

OPINIONS BELOW

Cheshire seeks review of *Cheshire Medical Center v. W.R. Grace & Co.*, 49 F.3d 26 (1st Cir. 1995), *aff'g* 853 F.Supp. 564 (D.N.H. 1994). The district court decision is reprinted in the Appendix ("A") at A25-50; the appellate decision at A1-24; and the denial of Cheshire's petition for panel rehearing and request for rehearing en banc at A51-52.

STATEMENT OF JURISDICTION

The First Circuit opinion Cheshire asks this Court to review was entered on March 6, 1995. A1. Cheshire timely filed a petition for rehearing and request for rehearing en banc on March 20, 1995. A71. It was denied on May 17, 1995. A51.

Jurisdiction is proper under 28 U.S.C. §1254(1), 28 U.S.C. §2101(c), and Supreme Court Rule 13.4 in that this petition for a writ of certiorari was filed within ninety days from the date the Court of Appeals denied Cheshire's petition for rehearing.

FEDERAL RULE INVOLVED IN THE CASE

Rule 51 of the Federal Rules of Civil Procedure provides:

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law set forth in the requests. The court shall then

inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court, at its election, may instruct the jury before or after the argument, or both. No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.

STATEMENT OF THE CASE

Cheshire at trial sought to recover from W.R. Grace & Company and W.R. Grace & Co.-Conn. ("Grace") the cost of abating and removing Monokote, an asbestos-containing fireproofing Grace manufactured, from its hospital building. A3 (49 F.3d at 28). Cheshire's liability theories included the claim that Grace was negligent for failing to provide Cheshire adequate warnings about the fireproofing, and the separate claim that inadequate product warnings also rendered Grace strictly liable under New Hampshire product liability law. A29 (853 F.Supp. at 567).

While Cheshire did not propose a written request to charge that inadequate warnings could render Grace strictly liable, A34-35 n. 3 (853 F.Supp. at 569),[1] Grace

[1] In the First Circuit, oral objections to the charge must be made after the jury is charged but before it begins deliberations. Prior written requests to charge are insufficient. *Transnational Corp. v. Rodio & Ursillo, Ltd.*, 920 F.2d 1066, 1069 (1st Cir. 1990). All the federal appellate courts apparently agree that Rule 51 does not require that requests to charge be written. *See Lear v.*

made a written charge request on this particular strict liability claim:

> . . . In order to prevent a product from being unreasonably dangerous, the seller may be required to give a warning as to the possible dangers but only if it knew or should have known of these dangers at the time of the sale. . . . As with the plaintiff's negligence claim, W.R. Grace & Co. cannot be liable to Cheshire Medical Center if, at the time of the sale, it neither knew or should have known about possible dangers in its product.
>
> A74.

The only warning charge given, however, was a negligence instruction which charged that, if Grace knew or should have known that the fireproofing it sold to Cheshire was dangerous or would damage property, Grace had a duty to inform Cheshire "in the exercise of reasonable care." A29 (853 F.Supp. at 567).

While the separate strict liability instructions further charged that Grace could be strictly liable if the fireproofing was in an "unreasonably dangerous condition," A30-31 (853 F.Supp. at 567), the District Court did not give Grace's written request to charge on strict liability for inadequate warnings or otherwise explain to the jury

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Equitable Life Assurance Society of the United States, 798 F.2d 1128, 1133 (8th Cir. 1986), *cert. denied*, 479 U.S. 1066 (1987); *Sharp v. Root*, 240 F.2d 519, 522-23 (5th Cir. 1957); *Winstead v. Hildenbrand*, 159 F.2d 25, 27 (D.C.Cir. 1947) (per curiam); *Swiderski v. Moodenbaugh*, 143 F.2d 212, 213 (9th Cir. 1944).

that an inadequate product warning is itself an "unreasonably dangerous condition" which can render Grace strictly liable. A26-27 (853 F.Supp. at 566).

The District Court gave the parties the opportunity to object to the instructions after the jury was fully charged but before it began its deliberations. A72. The Court stopped Cheshire's attempt to incorporate any of its previous written requests to charge, admonishing Cheshire that "if it had an objection to the charge, I think you better make it right here." A72. Cheshire did exactly what the Court directed and, as its first objection, Cheshire raised the failure to charge that inadequate warnings can render Grace strictly liable:

> MR. SPEIGHTS (Cheshire's Counsel): Your, Honor, we do not believe the Court charged that a – failure to warn can also make a product unreasonably dangerous, that it can be a defective and dangerous product under strict liability as well as a count in the negligence cause of action. A product may be unreasonably dangerous if it does not have an adequate warning.
>
> A72.

After the Court overruled this objection, the jury returned a special verdict which found for Grace on Cheshire's negligence and strict liability claims. A3-4 (49 F.3d at 28-29).

Cheshire's motion for a new trial raised the omitted strict liability charge. A26 (853 F.Supp. at 566). The District Court's decision on the motion never suggested that the District Court had misunderstood Cheshire's request to charge on strict liability for inadequate warnings, that it lacked an opportunity to correct this error before the jury deliberations, or that Cheshire's

objection was otherwise insufficient under Fed.R.Civ.P. 51. A26-36 (853 F.Supp. at 566-69).[2] To the contrary, the District Court explicitly held that its failure to charge on strict liability for inadequate warnings was indeed legal error, that Cheshire "properly preserved this issue by timely objection," and that Cheshire is "entitled to a new trial, on the strict liability claim, if the error affected its substantial rights:"

> Because the instruction given did not specifically inform the jury that the manufacturer's failure to warn could be relevant to the existence of an unreasonably dangerous design defect, *Chellman* [*Chellman v. Saab-Scania AB*, 138 N.H. 73, 637 A.2d 148 (1993)] compels the conclusion that the court's omission of a strict liability failure-to-warn instruction was indeed error. Plaintiff's counsel properly preserved the issue by timely objection. Accordingly, Cheshire is entitled to a new trial, on the strict liability claim, if the error affected its substantial rights.
>
> A31-32 (853 F.Supp. at 568).

The only reason the District Court denied Cheshire a new trial on its strict liability claim was the District Court's belief that the error it admittedly made was harmless because "the jury's verdict on the negligence count necessarily precluded a finding in plaintiff's favor with respect to the strict liability duty to warn." A35-36 (853 F.Supp. at 569).

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[2] Grace's response to Cheshire's motion for a new trial also failed to suggest that this issue was not adequately preserved.

In contrast to the District Court's ruling that Cheshire "properly preserved" the omitted strict liability instruction, the District Court's post-trial decision further noted that Cheshire did not object to the Court's separate failure to charge on New Hampshire's asbestos exposure levels. A39 (853 F.Supp. at 571).

Cheshire raised both omitted charges on appeal. As to Grace's strict liability, Cheshire argued that the error the District Court admittedly made was not harmless because the omitted charge would have explained that Grace can be strictly liable for inadequate product warnings despite its reasonable care to warn. A2, 21 (49 F.3d at 29, 35).[3] The First Circuit assumed that the District Court correctly held this failure to charge was error, A5 (49 F.3d at 29), but avoided deciding whether the error was harmless. The Court instead held that Cheshire's objection was not specific enough to satisfy Fed.R.Civ.P. 51. A21-22 (49 F.3d at 35). In reaching this conclusion, the First Circuit did not even mention the District Court's contrary holding that Cheshire had "properly preserved the issue by timely objection" and is "entitled to a new trial, on the strict liability claim, if the error affected its substantial rights." A31-32 (853 F.Supp. at 568).

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[3] In *Chellman*, the New Hampshire Supreme Court reaffirmed that strict liability under the Restatement (Second) of Torts, §402A, applies to inadequate warning claims and that a manufacturer may be strictly liable "despite the care exercised to design a safe product." *Chellman*, 138 N.H. at 77, 637 A.2d at 150.

The First Circuit also failed to perform a plain error review of the strict liability charge the District Court held was erroneous.

The First Circuit did, however, perform a plain error review on Cheshire's separate challenge to the failure to charge the New Hampshire asbestos exposure levels. A9-10 (49 F.3d at 30-31). Unlike the objection to the admittedly erroneous charge, both the First Circuit and the District Court noted that Cheshire failed to object to the instructions on the asbestos exposure level. A9 (49 F.3d at 30); A39 (853 F.Supp. at 571).

Cheshire's timely filed petition for rehearing and request for rehearing en banc argued: (1) the Court did not pay the required deference to the District Court's conclusion that Cheshire "properly preserved" the omitted strict liability instruction and is "entitled to a new trial, on the strict liability claim, if the error affected its substantial rights," A31-32 (853 F.Supp. at 568); and (2) the Court, after reviewing the other instruction for plain error, should have also reviewed for plain error the strict liability instruction the District Court admitted was erroneous and held was properly preserved. A54-57, 62-64, 68-70.

Cheshire's petition for rehearing and request for rehearing en banc was denied on May 17, 1995. A51-52.

REASONS FOR GRANTING THE WRIT

Since at least 1876, this Court has consistently held that the purpose served by specific instructional objections is to give the trial court an opportunity to correct the error before the jury deliberations. District courts are of course in the best, if not the only, position to decide whether or not an objection gave them this opportunity. A district court's conclusion that a timely objection did indeed properly preserve an error is thus entitled to at least some deference on appeal. This Court has shown such deference. The First Circuit did not.

Certiorari is also necessary to resolve the split among the Courts of Appeals on whether or not they can review instructions for plain error in civil cases and, if so, what if any limits exist on their discretion to do so. In this case, the First Circuit reviewed another instruction for plain error without reviewing for plain error the charge the district court held was erroneous and concluded was properly preserved.

I. THE REPEATEDLY DECLARED PURPOSE OF REQUIRING SPECIFIC INSTRUCTIONAL OBJECTIONS SHOWS THAT DEFERENCE IS OWED TO A DISTRICT COURT'S DECISION THAT AN OBJECTION "PROPERLY PRESERVED" THE CLAIMED ERROR.

Decisions dating from at least *Beaver v. Taylor*, 93 U.S. 46 (1876) to *Palmer v. Hoffman*, 318 U.S. 109 (1943), repeatedly hold that the purpose served by requiring specific instructional objections is to give the trial court "an opportunity to correct errors and omissions himself

before the same are made the basis of error proceedings." *Pennsylvania Railroad Company v. Minds*, 250 U.S. 368, 375 (1919) (citations omitted).

More recently, *Sunkist Growers v. Winckler & Smith Co.*, 370 U.S. 19, 26-27 (1962) held that the petitioner's acquiescence at trial to the instructions it objected to on appeal did not forfeit its objection because the record showed that the district court understood the objection and assured counsel that its objection was preserved. In *Memphis Community School District v. Stachura*, 477 U.S. 299, 305 n. 6 (1986), this Court similarly rejected a challenge brought under Fed.R.Civ.P. 51 because the exchange of case citations was sufficient to show that the District Court understood the objection to the instructions.

In this case, the District Court explicitly held that Cheshire's objection to the failure to charge strict liability for inadequate product warnings "properly preserved" the issue. A32 (853 F.Supp. at 568). Because the First Circuit did not mention this district court decision, even after Cheshire emphasized it in Cheshire's petition for rehearing (A54-56, 63-64), the appellate court's contrary conclusion was necessarily based on a de novo review.

De novo review is inappropriate. District courts are obviously in the best, if not only, position to decide for themselves whether or not an objection is specific enough to give them an opportunity to correct their instructional errors. Just as "the district court is better situated than the court of appeals to marshall the pertinent facts and apply the fact-dependent legal standard mandated by Rule 11," *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 402 (1990), the district court is far better situated than the

court of appeals to apply the fact-dependent specificity standard mandated by Fed.R.Civ.P. 51. In other words, the "respective institutional advantages of trial and appellate courts," *Wilton v. Seven Falls Co.*, 515 U.S. ___, 115 S.Ct. 2137, 2143, 132 L.Ed.2d 214, 225 (1995) (citations omitted), compels deference to the district court's conclusion that an instructional objection was specific enough to preserve the issue.

While literally scores of appellate decisions have addressed whether or not an instructional objection is sufficiently specific to meet the requirements of Fed.R.Civ.P. 51, *see* 9A Wright & Miller, *Federal Practice & Procedure*, Civil 2d §2554 at 419-31 (1994) (collecting cases), this Court has apparently never determined what level of review Courts of Appeals should apply to district court decisions on whether or not an objection was properly preserved in civil cases. This is "an important question of federal law which has not been, but should be, settled by this Court. . . . " Sup.Ct. Rule 10.1(c).

II. IN A CRIMINAL CASE, THIS COURT DEFERRED TO A DISTRICT COURT'S CONCLUSION THAT INSTRUCTIONAL OBJECTIONS PROPERLY PRESERVED THE ERROR.

While this Court has apparently never addressed the issue in a civil case, in an early criminal case this Court deferred to a trial court's ruling that the objections to the instructions properly preserved the issues for appeal.

In *Hicks v. United States*, 150 U.S. 442 (1893), this Court held that the exceptions to the charge were sufficiently specific to raise the questions considered because

"the learned judge below seems to have been satisfied with the shape in which the exceptions were presented to him . . . ." *Id.* at 453. The two member dissent took this deference to task:

> The suggestion that because the learned judge below was satisfied with the shape in which the exceptions were presented to him, this court must consider them as sufficient for any matter which the ingenuity of counsel may, since the trial, have discovered, has certainly the merit of novelty.

Id. at 457 (Brewer, J., joined by Brown, J., dissenting).

Because the standard of review of a trial court's decision on the adequacy of an instructional objection should be the same for both civil and criminal cases, the First Circuit's lack of deference in the present case places this case within that narrow class of cases where a Court of Appeals "has decided a federal question in a way that conflicts with applicable decisions of this Court." Sup.Ct. Rule 10.1(c).

III. CERTIORARI IS NECESSARY TO RESOLVE THE CIRCUIT SPLIT ON WHETHER PLAIN ERROR REVIEW OF INSTRUCTIONS IS AVAILABLE IN CIVIL CASES.

After silently overruling the District Court's decision that the omitted strict liability charge was "properly preserved by timely objection," A32 (853 F.Supp. at 568), the First Circuit inexplicably failed to review the admittedly erroneous charge for plain error after it reviewed another instruction for plain error. A9 (49 F.3d at 30-31).

City of Newport v. Facts Concerts, Inc., 453 U.S. 247, 257 n. 16 (1981) found it unnecessary to review the Courts of Appeals' application of a "plain error exception" to Fed.R.Civ.P. 51. At the time, only Ninth Circuit panel decisions held that there is no such exception. *See, e.g., Bertrand v. Southern Pacific Co.*, 282 F.2d 569, 572 (9th Cir. 1960), *cert. denied* 365 U.S. 816 (1961).

The split among the Courts of Appeals has widened since *City of Newport* was rendered. An en banc Ninth Circuit decision has reaffirmed that the courts in its circuit can not review instructions in civil cases for plain error. *Hammer v. Gross*, 932 F.2d 842, 846-848 (9th Cir. en banc), *cert. denied* 502 U.S. 980 (1991). The Seventh Circuit now agrees. *See, e.g., Hebron v. Touchy*, 18 F.3d 421, 424 (7th Cir. 1994); *Deppe v. Tripp*, 863 F.2d 1356, 1362 (7th Cir. 1988). These courts reason that Fed.R.Civ.P. 51 precludes any plain error review because the rule lacks a provision comparable to the plain error provision in Fed.R.Crim.P. 52(b). *See Hammer*, 932 F.2d at 848; *Deppe*, 863 F.2d at 1360-61. In *City of Newport*, Justice Brennan's dissent, joined by Justices Marshall and Stevens, noted this distinction. *City of Newport*, 453 U.S. at 276 n. 7 (dissenting opinion).

The *City of Newport* dissent, however, further recognized that other Courts of Appeals have in civil cases reviewed unpreserved instructional objections for plain error because, "like other procedural rules, Rule 51 is susceptible to flexible interpretation when strictly necessary to avoid a clear miscarriage of justice." *City of Newport*, 453 U.S. at 274-75 (dissenting opinion; citations omitted). In a decision authored by then Circuit Judge Breyer, for example, the First Circuit noted in *Jordan v.*

United States Lines, Inc., 738 F.2d 48, 51 (1st Cir. 1984), that the Court saw "no 'plain error' " after it held that the instructional objection was not specific enough to satisfy Fed.R.Civ.P. Rule 51. The Tenth Circuit also reviews instructions for plain error, but, like the First Circuit, has apparently never reversed a judgment based on a plainly erroneous instruction. *See, e.g., Lusby v. T.G. & Y Stores, Inc.*, 796 F.2d 1307, 1311-12 (10th Cir.), *cert. denied*, 479 U.S. 884 (1986).

The remaining nine circuits have all reversed judgments based on unpreserved, but plainly erroneous, instructions. *See, e.g., Und Commerz Union Austalt v. Collector's Guild*, 930 F.2d 1021, 1027 (2d Cir. 1991); *Pritchard v. Liggett & Myers Tobacco Co.*, 350 F.2d 479, 486 (3d Cir. 1965), *cert. denied* 382 U.S. 987 (1966); *Stewart v. Hall*, 770 F.2d 1267, 1267 (4th Cir. 1985); *Rodrigue v. Dixilyn Corp.*, 620 F.2d 537, 540-41, 544 (5th Cir. 1980), *cert. denied* 449 U.S. 1113 (1981); *O'Brien v. Willys Motors, Inc.*, 385 F.2d 163, 166-167 (6th Cir. 1967); *Morris v. Getscher*, 708 F.2d 1306, 1309-1311 (8th Cir. 1983); *Pate v. Seaboard Railroad, Inc.*, 819 F.2d 1074, 1082-1083 (11th Cir. 1987); *Shokuwan Shimabukuro v. Higeyoshi Nagayama*, 140 F.2d 13 (D.C. 1944), *cert. denied* 322 U.S. 755 (1944);[4] *American Hoist & Derrick Co. v. Sowa & Sons, Inc.*, 725 F.2d 1350, 1364 (Fed.Cir. 1984), *cert. denied* 469 U.S. 821 (1984).

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[4] Then Circuit Judge Scalia was a panel member in a later decision from the District of Columbia Court of Appeals which questioned whether or not plain error review applies in civil cases. *Hobson v. Wilson*, 737 F.2d 1, 32 n. 96 (1984), *cert. denied* 470 U.S. 1984 (1985) (noting split of authority).

These reversals would have necessarily been affirmed had the appellants litigated in one of the twelve states which comprise the Seventh and Ninth circuits. Certiorari is necessary to resolve this circuit split. Sup.Ct Rule 10.1(a).

IV. CERTIORARI IS NECESSARY TO DETERMINE WHAT, IN ANY, LIMITS EXIST ON THE COURTS OF APPEALS DISCRETION TO REVIEW FOR PLAIN ERROR IN CIVIL APPEALS.

The First Circuit reviewed the omitted asbestos exposure level charge for plain error, A9-10 (49 F.3d at 30-31), but inexplicably failed to review for plain error the strict liability charge the District Court admitted was erroneous. A31-32 (853 F.Supp. at 568).

United States v. Olano, 507 U.S. ___, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993) recently addressed the discretion Courts of Appeals have to correct plain error under Fed.R.Crim.P. Rule 52(b). After noting that the text of Fed.R.Crim.P. Rule 52(b) indicates that an appellate court's ability to correct plain error is "permissive, not mandatory," this Court nevertheless limited that discretion by holding that a Court of Appeals should correct plain errors "in those circumstances in which a miscarriage of justice would otherwise result" or where the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.* at ___, 113 S.Ct. at 1778-79, 123 L.Ed.2d at 520-21.

Citing *Olano*, several Courts of Appeal have applied the same standard in civil appeals, holding that " 'the

principles and decision enunciated in *Olano* apply *a fortiori* in the civil context where courts pay less strict attention to procedural protocol.' " *Highlands Ins. v. National Union Fire Ins.* 27 F.3d 1027, 1032 (5th Cir. 1995), *cert. denied*, 513 U.S. ___, 115 S.Ct. 903, 130 L.Ed.2d 786 (1995), *citing Smith v. Gulf Oil Co.*, 995 F.2d 638, 646 (6th Cir. 1993). *See also Rush v. Smith*, 56 F.3d 918, 925-26 (8th Cir. en banc 1995) (dissent advocated applying *Olano*). On the other hand, Mr. Justice Brennan's dissent in *City of Newport* noted that the rules' text "suggests that review of unchallenged jury instructions is intended to be more restrictive under the Civil than under the Criminal Rules." *City of Newport*, 453 U.S. at 276 n. 7.

Applying the standard later established in *Olano*, early diversity-based product liability decisions have reversed jury verdicts where unchallenged instructions charged non-existent defenses or improperly shifted the burden of proof. In *Pritchard*, for example, the Third Circuit applied a "miscarriage of justice" standard when it reversed a jury verdict for the manufacturer because a plainly erroneous instruction charged a non-existent assumption of the risk defense to an express warranty claim. *Pritchard*, 350 F.2d at 486. The Sixth Circuit's *O'Brien* decision similarly held that the erroneous charge "seriously affected the fairness, integrity or public reputation" of the proceeding when it reversed a jury verdict for a manufacturer based on the unchallenged failure to charge that the manufacturer had the burden of proving contributory negligence. *O'Brien*, 385 F.2d at 166-67. The Fifth Circuit's *Rodrigue* decision similarly found "substantial injustice" when it reversed a jury verdict for a manufacturer based on an unchallenged instruction which

charged a non-existent "contributory negligence" defense to the plaintiff's strict product liability claim. *Rodrigue*, 620 F.2d at 540-41.

In this case, the District Court explicitly held that *Chellman v. Saab-Scania AB*, 138 N.H. 73, 637 A.2d 148 (1993) compelled its holding that the failure to charge strict liability for inadequate warnings was an error which entitled Cheshire "to a new trial, on the strict liability claim, if the error affected its substantial rights." A31-32 (853 F.Supp. at 568).

After Cheshire pointed out on appeal that the admitted error did indeed affect its substantial rights because a properly instructed jury could have found Grace strictly liable for inadequate warnings despite its reasonable care,[5] the First Circuit assumed that the District Court correctly held that the omission was error, A5 (49 F.3d at 29), but refused to decide if there was "grave doubt as to the harmlessness of [the admitted] error," *O'Neal v. McAninch*, 513 U.S. ___, ___, 115 S.Ct. 992, 994, 130 L.Ed.2d 947, 951 (1995), or if the admittedly flawed instruction seriously affected the proceeding's fairness.

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[5] An inadequate warning can render the seller strictly liable "despite the care exercised to design a safe product." *Chellman*, 138 N.H. 73, 77, 637 A.2d 148, 150 (1993). Then Circuit Judge Breyer reached the same conclusion in *Brochu v. Ortho Pharmaceutical Corp.*, 642 F.2d 652 (1st Cir. 1981). The Court, applying New Hampshire law, held that a "product sold without adequate warnings is in a defective condition" and approved a jury charge that this defect can render the seller strictly liable even though it "exercised all possible care in the preparation and sale of the product . . . ." *Id.* at 660-661.

In sharp contrast, the First Circuit reviewed another instruction for plain error, concluding that the error, if any, was harmless. A9-10 (49 F.3d at 26).

Certiorari is necessary to determine whether or not the Courts of Appeals can arbitrarily pick which instructions it will review for plain error and whether the limits *Olano* placed on the Court of Appeals' discretion to refuse plain error review applies in civil appeals. *Olano*, 507 U.S. at ___, 113 S.Ct. at 1778-79, 123 L.Ed.2d at 520-21. This too is "an important question of federal law which has not been, but should be, settled by this Court. . . . " Sup.Ct. Rule 10.1(c).

CONCLUSION

Certiorari should be granted and the case remanded for the First Circuit to apply a deferential standard of review to the District Court's explicit conclusion that the admittedly erroneous strict liability charge was "properly preserved by timely objection," and that Cheshire is accordingly "entitled to a new trial, on the strict liability claim, if the error affected its substantial rights," or for the First Circuit to at least review for plain error the instructional error the District Court admittedly made.

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CHESHIRE MEDICAL CENTER,
Plaintiff-Appellant,

v.

W.R. GRACE & CO., Defendant-Appellee.

No. 94-1687.

United States Court of Appeals,
First Circuit.

Heard Dec. 7, 1994.

Decided March 6, 1995.

Building owner brought products liability action against manufacturer of asbestos-containing product under New Hampshire theories of negligence and strict liability. The United States District Court for the District of New Hampshire, Steven J. McAuliffe, J., 853 F.Supp. 564, entered judgment on jury verdict for manufacturer and denied owner's motion for new trial. Owner appealed. The Court of Appeals, Keeton, District Judge, sitting by designation, held that: (1) manufacturer did not have duty to warn based on speculation that product might be dangerous; (2) district court did not commit plain error in failing to instruct jury on state standard for asbestos exposure; (3) manufacturing defect, design defect, and warning defect were three separate theories of strict liability, not merely factors that could support single finding of strict liability; (4) jury's finding on negligence-based duty-to-warn claim barred strict liability duty-to-warn claim; (5) jury did not have unlimited authority under New Hampshire law to weigh all policy arguments to reach single finding on strict liability claim; and (6) owner failed to preserve for appellate review issue of whether New Hampshire imposed more onerous

duty than one of prudent care as part of law of strict products liability.

Affirmed.

Daniel A. Speights, Hampton, SC, with whom Michael P. Hall, Nixon, Hall and Hess, Manchester, NH and Speights & Runyan, Hampton, SC, were on brief, for appellant.

Richard V. Wiebusch, with whom Harry T. Daniels, Jane Cetlin Pickrell, Hale and Dorr, Manchester, NH, Howard M. Cooper and Todd & Weld, Boston, MA, were on brief, for appellee.

Before SELYA and CYR, Circuit Judges, and KEETON,* District Judge.

KEETON, District Judge.

Appealing from a judgment for the defendant on a jury verdict, plaintiff-appellant argues an interesting undecided issue of New Hampshire law regarding the scope of strict liability on the ground of product defect in relation to warning and instructions for use. May a product marketer be held strictly liable on the basis of failure to warn, for harm to a building into which its product (containing asbestos fibers) was installed, even though the jury has found, in answering special questions, that plaintiff failed to prove any departure from ordinary prudence with respect to warning and instructions for use?

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* Of the District of Massachusetts, sitting by designation.

We conclude that the jury findings, together with settled rules of federal procedural law and New Hampshire substantive law, preclude our reaching this interesting question. For the reasons explained, we affirm the judgment for the defendant on the verdict of the jury.

I.

Plaintiff-appellant alleged that defendant's product, Monokote 3, a fireproofing material, purchased in 1971 by a subcontractor in compliance with specifications, and used in constructing a building occupied and used at all relevant times by plaintiff (an entity designated in the general contract for construction of the building as "owner") was defective because of a percentage of asbestos particles in the product. In the various counts of the complaint, plaintiff alleged claims of negligence (in manufacture, sale, and warning), strict liability for product defect, and breach of implied warranty.

The case was submitted to a jury on special questions, Fed.R.Civ.P. 49(a). The jury returned the following answers:

SPECIAL VERDICT FORM

1. On the statute of limitations defense, do you find for the Plaintiff or the Defendant?

x Plaintiff _ Defendant

If you find for the Defendant on this issue, stop and return a verdict in favor of the Defendant.

If you find for the Plaintiff on this issue, answer questions 2, 3, 4, 5 and/or 6.

2. On Plaintiff's negligence claim, do you find for the Plaintiff or the Defendant?

_ Plaintiff x Defendant

3. On Plaintiff's products liability claim, do you find for the Plaintiff or the Defendant?

_ Plaintiff x Defendant

4. On Plaintiff's implied warranty claim, do you find for the Plaintiff or the Defendant?

_ Plaintiff x Defendant

5. If you found for the Plaintiff on one or more of its claims (questions 2, 3, or 4) please write the amount of damages you award to Plaintiff using words and figures (as in writing a check).

Damages awarded: -none-

($)

6. If you found for the Defendant on each of Plaintiff's claims (questions 2, 3, and 4), then return a verdict in favor of Defendant.

DATE: 11/3/93

/s/
Foreperson

The court's charge to the jury included instructions advising the jury they should answer that the plaintiff had proved negligence if they found by a preponderance of the evidence that defendant failed to exercise ordinary prudence in manufacture, or in sale, or in relation to warning (including instructions for use). Thus, unless plaintiff-appellant shows some trial error that undermines this finding (and we conclude in Part III, *infra*, that

plaintiff-appellant has failed to do so), we must accept as an established fact that, in relation to warning and instructions for use of the product, plaintiff failed to prove any departure from ordinary prudence.

The court's charge to the jury on *strict liability* failed to include any reference to warning or instructions for use. We assume, as did the trial court in considering plaintiff's motion for new trial, that this was error. *See Chellman v. Saab-Scania AB*, 138 N.H. 73, 637 A.2d 148 (1993). The trial court concluded, however, that the error was harmless. So do we, though on somewhat different reasoning from that of the trial court because, unlike the trial court, we do not undertake to predict exactly how the Supreme Court of New Hampshire will resolve a novel issue of substantive law on which plaintiff-appellant relies.

II.

It is settled law in New Hampshire that strict liability for product defect includes manufacturing defect, design defect, and warning defect. *See Chellman*, 637 A.2d 148; *see also Brochu v. Ortho Pharmaceutical Corp.*, 642 F.2d 652, 661 (1st Cir.1981).

New Hampshire cases have not yet determined, however, whether, as appellant asserts, a breach of the strict liability duty to warn can be proved on some basis short of proving failure to exercise ordinary prudence in relation to warning and instructions for use. Stated another way, the undecided question is whether the duty of warning under the strict liability theory requires something

more of the marketer than does the duty of warning under negligence law and, if so, what.

Whether the duty is more onerous is an unsettled question of New Hampshire substantive law. Contrary to appellant's assertion, this question of New Hampshire law was not decided in *Chellman*, 637 A.2d 148. Instead, that was a case in which the plaintiff did not ask the court to submit a negligence claim to the jury. *See id.* at 151. In that context, omission from the trial court's charge of even an instruction on prudent care with respect to warning was reversible error because plaintiff was completely deprived of the opportunity to have the jury consider the duty-to-warn claim. In this case, in contrast, the jury did consider a duty-to-warn claim. They did so under the negligence question. And we must conclude that the jury rejected that claim because they were instructed that they should find for plaintiff in answering the negligence question if they found for the plaintiff on other grounds *or* if they found that defendant failed to use ordinary prudence in relation to warning or instructions for use and that this failure was a cause of any harm sustained by plaintiff.

In three separate avenues of attack, appellant seeks to avoid the preclusive effect of the jury finding of no causal negligence. The first avenue is a two-fold challenge to the finding itself, which we discuss in Part III. We examine the other avenues separately in Parts IV and V.

III.

Appellant has challenged the jury's finding of no causal negligence on two grounds. Appellant asserts that the trial court's duty-to-warn instruction on the negligence count was erroneous. Appellant also asserts that the trial court erred in failing to instruct the jury on the New Hampshire statutory asbestos exposure standard. We conclude that neither of these attacks has merit.

A. The Duty-To-Warn Instruction Given

Appellant challenges the duty-to-warn instruction given by the trial court on the negligence claim. The jury was instructed that the defendant had a duty to warn if it "knew or should have known that the fireproofing it sold to the plaintiff was dangerous to people or that it would damage property." Appellant argues that this instruction is erroneous because it requires the plaintiff to prove that the product "was dangerous." Relying on language in *Chellman,* the appellant argues that a defendant has a duty to warn if a product "may be dangerous."

This argument is based more on form than substance. It is difficult to imagine what different meaning would be conveyed by an instruction, instead of that given, that the defendant had a duty to warn if it knew or should have known that the fireproofing it sold to the plaintiff *may* be dangerous. To the extent that this phrasing conveys the same meaning – for example, that the defendant had a duty to warn if the defendant knew or should have known that the product causes harm in some (but not necessarily all) instances – the instruction given by the court was not in error.

To the extent that appellant is urging that its proposed language conveys a different meaning – that the defendant has a duty to warn if it should have known that there was a mere possibility that the product was in the category of dangerous products (i.e., one that causes harm in some instances) – the argument for application of a legal test framed in this particular way has no basis in New Hampshire law.

Under New Hampshire law, a manufacturer need not warn of all potential dangers associated with a product. *See Thibault v. Sears, Roebuck & Co.*, 118 N.H. 802, 395 A.2d 843 (1978) (manufacturer need not warn of known, but very unlikely, risk of danger). Similarly, one may infer from this precedent that there is no duty to warn on the basis of speculation that a product might be dangerous. Thus, the meaning conveyed by the court's instruction is closer to the formulations found in New Hampshire cases than is appellant's proposed alteration, which itself is subject to different interpretations, some of which are inconsistent with the formulations in the New Hampshire cases. Thus, appellant's challenge on this ground fails.

B. The New Hampshire Asbestos Exposure Standard

Appellant challenges the trial court's failure to instruct the jury on the New Hampshire standard for indoor nonoccupational asbestos exposure. *See* N.H.Rev.Stat.Ann. 141-E:6. This numerical standard (.01 f/cc) triggers the applicability of certain New Hampshire regulations concerning asbestos abatement procedures used as a part of construction or maintenance.

The court instructed the jury on federal OSHA and EPA regulations, as well as the New Hampshire regulations establishing procedures to be followed during asbestos abatement projects. The court told the jury that the various state and federal statutes were relevant to the issue of damages only and not to the defendant's liability. Since the jury found no liability and therefore did not reach the issue of damages, the court's alleged error in failing to instruct the jury on the New Hampshire asbestos exposure standard is, in retrospect, irrelevant and therefore harmless, unless appellant can establish relevance to liability issues.

Appellant's challenge on appeal contains the implicit assertion that the New Hampshire asbestos exposure standard is relevant to the defendant's liability. The appellant, although objecting to the court's failure to instruct the jury on the New Hampshire statute, did not object to that part of the court's instruction telling the jury that these statutes were relevant to the issue of damages only and not to the issue of liability. The appellant having failed in its objections and request for instruction to articulate an argument for relevancy to liability or any legal basis for relevancy, we review the trial court's instruction only for plain error. *See Poulin v. Greer,* 18 F.3d 979, 982 (1st Cir.1994).

We conclude that it was not plain error, if error at all. The New Hampshire asbestos exposure standard does not impose a rule of conduct on sellers of asbestos products or contractors using asbestos products. Instead, it establishes a threshold of authorization for the director of the Division of Public Health Services to take certain regulatory action, if warranted. *See* N.H.Rev.Stat.Ann. 141-E:8.

In addition, it triggers the applicability of certain safety regulations to asbestos removal and abatement projects at relevant buildings. *See* N.H.Rev.Stat.Ann. 141-E:7.

We conclude that no decision cited to us, and none of which we are aware, establishes a basis for plaintiff's assertion that the New Hampshire asbestos exposure standard is relevant to the defendant's liability. Moreover, given that the New Hampshire state regulators have taken no action with respect to appellant's building, the standard at issue bears only upon the calculation of costs the appellant might incur in the future. For these reasons, we hold that even if there was error in the trial court with respect to this asbestos exposure standard, it was harmless in this case.

IV.

In oral argument and in its brief, appellant asserts that as a matter of substantive law a claimant is entitled to have the court instruct the jury that a claim of strict product liability is to be decided by a jury in a single evaluative finding after jury consideration of all relevant factors. Thus, for example, the appellant argues that if the jury thought there was some evidence of departure from ordinary prudence with respect to warning but not enough evidence for the jury to find departure from ordinary prudence by a preponderance of the evidence, the jury could nevertheless take this evidence into account among all the other factors they considered in deciding whether the product was defective.

Appellant asserted in oral argument before this court that the jury in a strict product liability case is allowed to,

and should be instructed to, make one overall weighing of all factors bearing upon (1) manufacturing defect, (2) design defect, and (3) warning defect. Appellant cites no precedent explicitly supporting this contention, and we are aware of none.

Two independently significant points are implicitly essential to the validity of the argument. We consider each.

A. Consideration of the Cumulative Effect of the Evidence

Appellant's argument depends on an implicit assumption that a claimant need not establish independently, by a preponderance of the evidence, any one of the three separate theories of strict liability (manufacturing defect, design defect, and warning defect).

In the context of this case, appellant argues that the evidence of failure to warn, although not sufficient by itself to support a finding of strict liability by a preponderance of the evidence, may be combined by the jury with any evidence of a design defect and may result in a finding of strict liability by a preponderance of the evidence. In some cases, this would lead to the anomalous result that the jury could find defendant strictly liable by a preponderance of evidence without finding by a preponderance of the evidence a manufacturing defect, a design defect, or a warning defect.

For example, the appellant implies that a plaintiff can prevail if the jury finds none of the three defects by a preponderance of the evidence and yet finds that the

evidence shows a .40 probability of each and, in some unexplained way, a .51 probability of defect in its overall weighing of all evidence received at trial.

This argument is flawed. A .40 probability of each of three separate defects cannot add up to a .51 probability overall. Instead, in this assumed circumstance, unless the three are interdependent (as they may be), there is no better than a .064 probability (.40 X .40 X .40) that all three are true, and neither mathematically nor as a matter of common sense do three .40 probabilities show a .51 probability that one of the three or some combination of two or all three is true.

Moreover, as a matter of settled law, judicial opinions and commentators alike refer to proof of manufacturing defect, design defect, and warning defect as three different ways of proving product defect, not just as factors bearing upon one way of proving product defect. *See Brochu*, 642 F.2d at 661 (discussing separately the "design-defect theory" and the "duty-to-warn theory" with respect to jury instructions under New Hampshire law); *Thibault*, 395 A.2d at 846 (distinguishing policy factors bearing upon strict liability for manufacturing defect from those bearing upon strict liability for design defect and citing James A. Henderson, Jr., "Judicial review of Manufacturers' Conscious Design Choices: The Limits of Adjudication," 73 Colum.L.Rev. 1531 (1973)); *see also* Restatement (Third) of Torts: Products Liability, § 2 cmt. a, Tentative Draft No. 1 (Apr. 12, 1994) (setting forth "separate standards of liability for manufacturing defects, design defects, and defects based on inadequate instructions or warnings," and explaining different sets of policy arguments and objectives for the separate standards); *id.*,

Reporters' Note, at 35-80 (explaining the Reporters' view that the formulation of separate standards for manufacturing, design, and warning defects is consistent with the weight of precedent); Oscar S. Gray, "The Draft ALI Product Liability Proposals: Progress or Anachronism?" 61 Tenn.L.Rev. 1105, 1108 (1994) (although criticizing the ALI Tentative Draft in other respects, accepting the point that "the overwhelming body of interpretation by the courts has accepted the three-pronged differentiation between manufacturing, design, and warning defects").

Appellant cites *Chellman* as holding, or at least implying, that there is only one strict product liability theory in New Hampshire law, and that only one question about the adequacy of plaintiff's proof of strict liability should be submitted to a jury. A close reading of the case, however, does not support the view that *Chellman* addressed the choice between (a) treating manufacturing defect, design defect, and warning defect as separate theories, each involving a distinctive standard for determining liability, and (b) treating the three as merely factors in a single multiple-factors standard for making an evaluative determination that a product is or is not a defective product.

In *Chellman*, the defendant argued that strict liability for design defect and strict liability for failure to warn were distinct, and that the plaintiff had failed to plead a strict-liability-for-failure-to-warn claim. *See Chellman*, 637 A.2d at 151. In deciding that the plaintiff's complaint sufficiently stated a strict liability claim, on the basis of inadequate warning, to meet plaintiff's burden of pleading, *see id.*, the court did not need to or purport to decide

whether proving defective warning and proving defective design in respects apart from warning were two separable ways of proving strict product liability. Thus, *Chellman* neither endorses nor rejects the general proposition that manufacturing defect, design defect, and warning defect are commonly treated by courts and commentators as three separate ways of proving product liability.

The commonly accepted understanding that a plaintiff must establish one or another of the three kinds of defects (manufacturing defect, design defect, or warning defect) by a preponderance of the evidence leaves the jury entirely free to weigh a single item of evidence as relevant to claims of two or even all three kinds of defect. Thus, for example, New Hampshire case law supports the proposition that evidence concerning the existence and adequacy of a warning is relevant not only to a warning defect claim, but also to a design defect claim. *See Chellman*, 637 A.2d at 150; *Reid v. Spadone Machine Co.*, 119 N.H. 457, 404 A.2d 1094, 1097 (1979) ("This condition [the placement of certain buttons on a machine], coupled with inadequate warnings against two-person use, could properly be found to have made the machine 'unreasonably dangerous.' ").

The issue before us now, however, does not concern admissibility of evidence. The jury was free under the court's rulings, absent limiting instructions, to consider all evidence received at trial. In these circumstances, we conclude that the jury's finding of no violation as to the duty-to-warn negligence claim bars the strict-liability-duty-to-warn claim. This is so because in finding that

there was no liability for failure to warn on the negligence theory the jury necessarily found either (1) that plaintiff failed to prove that the defendant's warnings and instructions violated the prudent care standard or (2) that, if the warning was inadequate, plaintiff failed to prove that the inadequacy of the warning *caused* the plaintiff's injury.

Under either of the two possible interpretations of the jury's finding, the jury has determined that plaintiff has failed to prove by a preponderance of the evidence any violation of a duty of prudent care as to warning. This bars the strict-liability-as-to-warning claim unless the law of New Hampshire imposes a more onerous duty than one of prudent care as part of the law of strict product liability.

B. An All-Factors Evaluative Determination

Appellant's weighing-of-all-factors argument, if taken at face value and without qualification, leads implicitly to a surrender of judicial responsibility for instructing the jury to respect the law's outside limits on jury discretion. It is true that appellant's argument for an unlimited all-factors evaluative determination by the jury has a surface plausibility, which may appear to be reinforced by support in some states for application of a standard requiring the jury to "weigh competing factors much as they would in determining the fault of the defendant in a negligence case." *Back v. Wickes*, 375 Mass. 633, 378 N.E.2d 964, 970 (1978). Thus:

> In evaluating the adequacy of a product's design, the jury should consider, among other

> factors, "the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design."

Id. 378 N.E.2d at 970 (quoting *Barker v. Lull Eng'r Co.*, 20 Cal.3d 413, 143 Cal.Rptr. 225, 573 P.2d 443 (1978) and citing *Bowman v. General Motors Corp.*, 427 F.Supp. 234, 242 (E.D.Pa.1977)).

The plausibility of appellant's argument is reinforced by the statement of the Supreme Court of New Hampshire in *Thibault* that:

> Inquiry into the dangerousness of a product requires a multi-faceted balancing process involving evaluation of many conflicting factors. . . . Reasonableness, foreseeability, utility, and similar factors are questions of fact for jury determination.

Thibault, 395 A.2d at 846-47; *see also Espeaignnette v. Gene Tierney Co.*, 43 F.3d 1, 5 (1st Cir.1994) (citing *St. Germain v. Husqvarna Corp.*, 544 A.2d 1283 (Me.1988) and discussing the "danger-utility" test used by the Maine courts). Perhaps even more supportive of appellant's argument is another passage from the opinion of the Supreme Judicial Court of Massachusetts in *Back v. Wickes Corp.*:

> In balancing all of the pertinent factors [in deciding whether there was a design defect] the jury makes a judgment as to the social acceptability of the design, and this is the same judgment originally made by the designer of the product.

378 N.E.2d at 970.

Even if one takes these passages to mean that some policy weighing is left to the jury, however, it does not follow that the legal system approves an unlimited all-factors evaluative determination by the jury. Even when approving a multiple-factors-weighing-test for jury use in finding an "ultimate fact," such as product defect, the legal system does not authorize the jury to give whatever weight the jury chooses to arguments of public policy for and against strict liability. To do so would leave to the jury an authority and responsibility that is unguided by any public policy determinations made in statutes and precedents.

Ordinarily issues of public policy are in the first instance appropriate for a legislature's determination by statute and, if not determined by statute, may be determined by a state court of last resort in its decisions setting precedents.

We do not understand appellant's counsel as explicitly arguing for a broad and sweeping jury discretion that extends to public policy issues ordinarily decided by statutes or precedents. We consider the argument in this extreme form, however, because of the procedural posture of this case.

Appellant seeks a new trial despite a supportable jury finding that defendant did not fail to exercise ordinary prudence with respect to warning and instructions for use. This contention, however, is procedurally barred unless plaintiff proffered an instruction or objection clearly giving the trial judge and the opposing party notice of this theory of claim, including a formulation of

an acceptable limit or qualification to distinguish plaintiff's contention from an argument for unlimited jury discretion. Thus, we consider the more extreme implications of the unqualified argument to make the two points that a limit is essential and that the burden is on the plaintiff to propose an acceptable explanation of that limit rather than asking a trial court to leave a jury unguided.

To sustain appellant's argument for a new trial on the procedural record before us, we would have to determine that New Hampshire tort law places no limit on the jury's authority, in reaching the jury's overall evaluative finding in a strict liability case, to weigh all policy arguments (or at least those policy arguments supported by any evidence received in the trial) for and against strict liability, in reaching the jury's overall evaluative finding in a strict liability case.

We cannot say that New Hampshire has adopted, and cannot predict that it will adopt, the novel position that the jury has this authority. Allowing the jury such sweeping authority would be contrary to premises so fundamental that courts only rarely sense a need to advert to them.

The first of these basic premises of settled law concerns the role of precedent in the legal system. A court's acceptance of an argument for a literally "all-factors" evaluative decision by a jury of a strict product liability claim would have the effect of delegating to the jury the authority and responsibility for weighing conflicting arguments of public policy bearing upon the scope and

limits of strict liability and striking the balance that determines the legal system's answer, *case by case.* This would undermine the function of precedent in the legal system – to promote evenhanded decision of like cases alike. Judicial decisions considering similar arguments for jury discretion to weigh public policy arguments have rejected the idea. *See, e.g., Shackil v. Lederle Laboratories,* 116 N.J. 155, 561 A.2d 511, 528 (1989) (the majority, over vigorous dissent, declined to leave to a jury a public policy choice that, it was argued, would drive DPT vaccine for infants off the market); *Bammerlin v. Navistar Int'l Transp. Corp.,* 30 F.3d 898 (7th Cir.1994) (the trial court, not the jury, should have made the evaluative determination whether a truck cab manufacturer complied with federal safety standards); *Bryant v. Tri-County Electric Membership Corp.,* 844 F.Supp. 347 (W.D.Ky.1994) (the court, not the jury, weighed "the public policy goals of protecting consumer and discouraging the sale of defective goods" and held that the strict liability doctrine applied to the services of electric utilities). *But cf. Dawson v. Chrysler Corp.,* 630 F.2d 950, 962-63 (3d Cir.1980), *cert. denied,* 450 U.S. 959, 101 S.Ct. 1418, 67 L.Ed.2d 383 (1981) (recognizing the dangers of such a case-by-case determination in the context of motor vehicle safety standards but declining to reverse a judgment entered on a verdict of a jury that was allowed very broad discretion by the trial court's charge).

A second basic premise of settled law is that determinations of liability (whether under a concept of "duty" or "cause" or some other terminology such as "scope of liability") are never exclusively "fact" questions to be decided by a jury, or by a judge as factfinder in a non-jury trial. Even when some disputed issue of historical fact is

relevant, the determination of "duty," "cause," or "scope of liability" is a mixed law-fact determination rather than exclusively a fact question. *See, e.g., Deguio v. United States*, 920 F.2d 103, 105 (1st Cir.1990) (determination of negligence is a mixed question of law and fact and entitled to clear error standard of review); *St. Paul Fire & Marine Ins. Co. v. Caguas Fed. Sav. & Loan Ass'n*, 867 F.2d 707, 708 (1st Cir.1989) ("Negligence and causation are traditionally mixed questions of fact and law."); *cf. Milliken & Co. v. Consolidated Edison Co.*, 84 N.Y.2d 469, 619 N.Y.S.2d 686, 644 N.E.2d 268 (N.Y.Ct.App.1994) ("The existence and scope of an alleged tortfeasor's duty, at the threshold, is a legal, policy-laden determination dependent on consideration of different forces, including logic, science, [and] competing socio-economic policies. . . . ").

When a jury participates in the determination of a mixed-law-fact question, it does so under instructions from the trial judge explaining the legal aspects of the evaluative "finding" the jury makes. *See Kissell v. Westinghouse Electric Corp.*, 367 F.2d 375, 376 (1st Cir.1966) (special interrogatories to the jury can be mixed questions of law and fact, if the jury is properly instructed as to the law); *see also Chellman*, 637 A.2d at 151 ("Clear and intelligible jury instructions are particularly important to explain complex or confusing legal concepts.").

In the face of these settled principles, no decision cited to us, and none of which we are aware, in New Hampshire or elsewhere, requires the submission to the jury of a single evaluative question determining a strict liability claim. We conclude that, in deciding this appeal in a diversity case, we should not predict an expansion of strict liability under New Hampshire law to the extent of

permitting juries a discretion not guided by instructions on the limits set by the public policy choices, explicit and implicit, in New Hampshire statutes and precedents. *Cf. Thibault*, 395 A.2d at 847 (indicating that the strict liability cause of action is narrower in New Hampshire than in some other jurisdictions); *Bagley v. Controlled Environment Corp.*, 127 N.H. 556, 503 A.2d 823, 826 (1986) (discussing *Buttrick v. Lessard*, 110 N.H. 36, 260 A.2d 111 (1969) and stating that the strict liability actions are limited to claims for which requiring a plaintiff to prove negligence would pose "a practical barrier to otherwise meritorious claims").

V.

Remaining for consideration is appellant's argument that even if the jury should not be allowed such sweeping discretion, at least appellant should be allowed a new trial to seek a jury finding under an instruction on duty to warn somewhat more burdensome to a defendant than merely a duty of ordinary prudence. This issue, however, is the question stated at the beginning of this Opinion. It is the interesting question that, on federal procedural grounds, we conclude we should not reach in this case. Not having objected precisely on this ground and not having proposed to the trial judge an acceptable instruction to the jury on a question that, viewed most favorably to appellant, is a mixed-law-fact question, appellant is precluded from advancing this contention now.

Plaintiff's requests for instruction and objection to the charge, generously construed in plaintiff's favor, were sufficient, we assume, to alert the trial judge to plaintiff's

contention that a departure from ordinary prudence with respect to warning and instructions for use would render the product defective for the purpose of plaintiff's strict liability claim. In its denial of the motion for new trial, the trial court conceded that its instruction had been in error in this regard.

Apart from this ground of request and objection, however, plaintiff proffered no form of instruction on duty to warn as part of the strict liability claim. For this reason, the request and objection were not specific enough to preserve any other issue with respect to the strict liability instruction for consideration on motion for new trial or on appeal. *See* Fed.R.Civ.P. 51; *see also Jordan v. United States Lines, Inc.*, 738 F.2d 48 (1st Cir.1984) (holding that appellant's objection to the trial court's instruction on the definition of "unseaworthiness" was not specific enough to satisfy Rule 51). Moreover, even in the brief before this court and on oral argument, appellant has failed to propose any instruction that would define the issue or issues left to be tried after we accept, as already tried and fairly determined, the issues decided by the jury verdict.

The jury findings (which we have determined are not undermined by any of appellant's attacks) must stand. And, as we have noted, appellant has not proffered any definition of an issue, for which there is support in precedent or in reason, left to be tried on new trial. To remand for new trial without providing any guidance about the issue or issues to be tried would be inappropriate. And, of course, it would be manifestly unfair to set aside the fairly determined jury findings and award a new trial

without limitation. Thus, we affirm the trial court's denial of the plaintiff's motion for new trial.

CONCLUSIONS

First. Plaintiff-appellant's challenges to the jury findings on the basis of the instructions given on duty to warn in negligence are without merit and the jury findings establish that plaintiff failed to prove causal negligence in any relevant way (including due care in warning and instructions for use) and plaintiff failed to prove that defendant is strictly liable on any ground apart from failure to warn.

Second. Plaintiff-appellant's requests for instruction and objection to the charge on the strict liability claim were not sufficient to preserve on motion for new trial and on appeal the contention that, under New Hampshire law, the duty to warn as a part of a strict liability claim requires more of a defendant than does the duty to warn in a negligence claim.

Third. New Hampshire substantive law does not require that a product defect be determined on the basis of an unlimited all-factors weighing by a jury, unguided by statutory and decisional limitations on the scope of strict liability.

Fourth. In light of these conclusions, the jury's verdict in defendant's favor on the duty to warn as part of the negligence claim precludes a finding in plaintiff's favor on the duty to warn as part of the strict liability

claim, and any error of the trial court with respect to the instruction on strict liability was harmless.

Judgment for defendant is AFFIRMED, with costs.

CHESHIRE MEDICAL CENTER, Plaintiff

v.

W.R. GRACE & CO. and W.R. Grace & Co.-Conn., Defendants.

No. CV-88-516-M.

United States District Court,
D. New Hampshire.

May 24, 1994.

Building owner brought suit against asbestos manufacturer for damage to its building allegedly resulting from installation of asbestos-containing fireproofing. Following jury verdict for manufacturer, building owner moved for new trial. The District Court, McAuliffe, J., held that: (1) building owner was not prejudiced by court's omission of failure-to-warn instruction relating to strict liability; (2) court's instruction properly directed jury's attention to those dangers that were foreseeable; (3) court's failure to instruct on New Hampshire statutes governing asbestos exposure levels and its failure to inform jury that defendant's fireproofing inevitably had to be removed from the building was harmless; (4) it was within trial court's discretion to permit inquiry beyond traditional strictures of cross-examination; and (5) building owner's proffered videotape was not proper rebuttal evidence.

Motion denied.

Daniel A. Speights, Hampton, SC, Michael P. Hall, Manchester, NH, for plaintiff.

Richard V. Wiebusch, Manchester, NH, Harry T. Daniels, Boston, MA, for defendants.

ORDER

McAULIFFE, District Judge.

Plaintiff Cheshire Medical Center ("Cheshire") sued W.R. Grace & Co. and W.R. Grace & Co.-Conn. (collectively "W.R. Grace") for damage to its building allegedly resulting from the installation of asbestos-containing fireproofing manufactured and supplied by defendant. Cheshire sought recovery under three theories of liability: negligence, strict liability, and breach of implied warranty. After an eighteen day trial, the jury returned a verdict for defendant on all three counts.

Cheshire now moves for a new trial, asserting evidentiary errors and errors in the jury charge.

I. Standard of Review

A motion for a new trial will be granted if a court has committed an error that adversely affects the moving party's substantial rights. Fed.R.Civ.P. 61; *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 553-54, 104 S.Ct. 845, 848-49, 78 L.Ed.2d 663 (1984). Harmless error is not grounds for a new trial. Fed.R.Civ.P. 61.

II. Jury Instructions

A. Strict Liability Failure to Warn

Cheshire's soundest claim relates to the court's failure to specifically instruct on defendant's "duty to warn" relative to Cheshire's strict liability theory. The court instructed the jury that W.R. Grace's failure to warn of any foreseeably dangerous uses of its product would

constitute a breach of a duty owed to the plaintiff under the law of negligence. However, the court did not specifically instruct the jury that W.R. Grace's failure to warn could also render its fireproofing product unreasonably dangerous for purposes of strict liability. Cheshire argues that the court's omission of a failure-to-warn instruction on its strict liability count amounted to prejudicial error requiring a new trial.[1]

In this diversity case, consideration of Cheshire's assertion of error necessarily begins with a review of applicable New Hampshire law. *Erie R.R. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). New Hampshire's strict liability law is different from that of many other jurisdictions that have adopted section 402A of the *Restatement (Second) of Torts*. Here, strict liability does not mean "liability without fault." *Simoneau v. South Bend Lathe, Inc.*, 130 N.H. 466, 469-70, 543 A.2d 407, 409 (N.H.1988); *Thibault v. Sears, Roebuck & Co.*, 118 N.H. 802, 806, 395 A.2d 843, 845-46 (N.H.1978). New Hampshire explicitly rejects the view that strict liability should serve as a no-fault compensation system or a means for spreading risk in society. *Thibault*, 118 N.H. at 806, 395 A.2d at 845-46. Rather, in this state strict liability actions are limited to claims arising from defective products where requiring a plaintiff to prove negligence would pose "a practical barrier to otherwise meritorious claims." *Bagley v. Controlled Environment Corp.*, 127 N.H. 556, 560, 503 A.2d 823, 826 (N.H.1986); *see also Buttrick v. Arthur Lessard*

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[1] If prejudicial error, relief would presumably extend only to granting a new trial on the strict liability count.

& Sons, Inc., 110 N.H. 36, 39, 260 A.2d 111, 113 (N.H.1969).

Under New Hampshire's law of products liability, "[t]he duty to warn is part of the general duty to design, manufacture, and sell products that are reasonably safe for their foreseeable uses." *Chellman v. Saab-Scania AB*, 138 N.H. 73, 78, 637 A.2d 148, 150 (N.H.1993). If the design of a product makes a warning necessary to avoid an unreasonable risk of harm from a *foreseeable* use, the lack of warning (or an inadequate warning) is sufficient to make the product defective and unreasonably dangerous. *See id.* (citing Restatement (Second) of Torts § 402A, cmts. h and j); *see also Thibault*, 118 N.H. at 808, 395 A.2d at 846-47. This duty to warn "is limited to foreseeing the probable results of the normal use of the product or a use that can reasonably be anticipated." *Thibault*, 118 N.H. at 808, 395 A.2d at 847 (quoting *McLaughlin v. Sears, Roebuck & Co.*, 111 N.H. 265, 268, 281 A.2d 587, 588 (N.H.1971)). A manufacturer is not required to warn against obvious dangers or absurd uses of a product because "individual consumers have certain responsibilities" to avoid unreasonable and unintended uses of a product. *Id.*

In *Chellman v. Saab-Scania AB, supra*, the New Hampshire Supreme Court held that a trial judge's refusal to give a failure-to-warn instruction on plaintiff's strict liability claim for defective design was reversible error. The jury in that case had been instructed on the general rule of strict liability for design defects, but "the charge did not explain that the jury could consider whether failure to warn of a foreseeable danger made the product defective." *Chellman*, 138 N.H. at 79, 637 A.2d at 151. Although

the jury found by special verdict that the product contained no design defects which would make it unreasonably dangerous, the supreme court held that "[c]onsideration of a warning, or lack thereof, *as part of the analysis of design defect*, is not obvious to a jury and must be explained through proper instruction. . . . " *Id.* (emphasis added). Because the jury instructions in *Chellman* "could have misled the jury as to the proper considerations for determining design defect," the trial court's failure to instruct on the manufacturer's duty to warn could not be deemed harmless error. *Chellman*, 138 N.H. at 80, 637 A.2d at 152.

In this case, Cheshire advanced two related claims: It alleged (1) that W.R. Grace's failure to place a warning on its fireproofing product was negligent, and (2) that the absence of a warning also rendered the fireproofing unreasonably dangerous. The court instructed the jury on plaintiff's negligence claim, in part, as follows:

> In determining whether or not the defendant was negligent you must consider whether the defendant breached any duties owed to the plaintiff.
>
> 1. Duty to Warn
>
> If the defendant knew or should have known that the fireproofing it sold to the plaintiff was dangerous to people or that it would damage property, the defendant had a duty in the exercise of reasonable care to inform purchasers of the fireproofing of that danger. The defendant had a continuing duty to warn the plaintiff of dangers associated with the fireproofing even after the sale of the fireproofing to the plaintiff if the defendant discovered after

the sale that the product was defective or dangerous.

2. Duty to Acquire Knowledge

The defendant, as a manufacturer, had a duty to be aware of available scientific knowledge concerning the health hazards associated with the asbestos contained in its fireproofing. Manufacturers are presumed to possess the skill and knowledge of experts in their business, and to possess expert knowledge concerning the materials and processes available to the industry.

3. Duty to Test for Defects

The defendant had a duty to use reasonable care to test its product to discover any latent or hidden defects. The defendant had a duty to test its fireproofing to see if it would release hazardous asbestos fibers during normal and foreseeable conditions of building use and maintenance.

Jury Instructions (Court Exhibit no. 2) at 16-17. The strict liability charge included the following instruction:

2. Unreasonably Dangerous Condition

A product is unreasonably dangerous if it poses a danger to an extent beyond that which may be contemplated by the ordinary consumer who purchases it, and who possesses the degree of knowledge as to its characteristics common to the community of persons intended to purchase and use the product.

In deciding whether the fireproofing product presents an unreasonable danger, you should consider the desirability and usefulness of the product to the public as a whole. Even if

> you decide that the fireproofing is desirable and useful to the public as a whole, consider whether the risk of unreasonable danger could have been reduced without significant impact on the effectiveness of the product and the cost of manufacturing; liability may exist if the manufacturer, W.R. Grace, did not take available and reasonable steps to lessen or eliminate the danger of even a useful and desirable product. A manufacturer is not obliged to design the safest possible product, or a safer product, or one as safe as others make, so long as the product it designed is not unreasonably dangerous.

Jury Instructions (Court Exhibit no. 2) at 19-20.

As noted, if a defendant's failure to warn is properly at issue in a strict liability design defect case, *Chellman* requires that the jury be instructed specifically on that point. Here W.R. Grace argues that this court's instruction directing the jury to consider whether defendant could have taken any "available and reasonable steps to lessen or eliminate the danger" posed by its product adequately informed the jury of the appropriate considerations, including whether the absence of a warning rendered the fireproofing product defective. The court respectfully disagrees.

The *Chellman* decision emphasized the possibly confusing or misleading aspects of a general instruction on defective design. The "available and reasonable steps" language of the strict liability instruction given in this case did little if anything to explain how a "non-obvious" duty to warn might relate to the issue of design defect. Because the instruction given did not specifically inform the jury that the manufacturer's failure to warn could be

relevant to the existence of an unreasonably dangerous design defect, *Chellman* compels the conclusion that the court's omission of a strict liability failure-to-warn instruction in this case was indeed error. Plaintiff's counsel properly preserved the issue by timely objection. Accordingly, Cheshire is entitled to a new trial, on the strict liability count, if the error affected its substantial rights.

In general, negligence and strict liability causes of action derive from distinct theories. Negligence focuses on the defendant's conduct, while strict liability focuses on the defendant's product. With respect to a manufacturer's failure to warn of a product's dangers, however, the distinction between negligence and strict liability is less apparent. Some courts have found no material distinction between the two causes of action where the strict liability duty to warn involves primarily negligence principles. *See, e.g., Kotler v. American Tobacco Co.*, 926 F.2d 1217, 1231 (1st Cir.1990) (applying Massachusetts law), *vacated*, ___ U.S. ___, 112 S.Ct. 3019, 120 L.Ed.2d 891 (1992), *reaff'd on remand*, 981 F.2d 7 (1st Cir.1992); *Werner v. Upjohn Co.*, 628 F.2d 848, 858 (4th Cir.1980), *cert. denied*, 449 U.S. 1080, 101 S.Ct. 862, 66 L.Ed.2d 804 (1981); *Gonzalez v. Volvo of America Corp.*, 752 F.2d 295, 300 (7th Cir.1985) (per curiam) (applying Indiana law); *Flaminio v. Honda Motor Co.*, 733 F.2d 463, 466 (7th Cir.1984) (applying Wisconsin law).

In *Kotler v. American Tobacco Co., supra*, the plaintiff brought claims for negligence and breach of warranty[2]

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[2] Massachusetts law does not provide for causes of action based on strict liability. However, warranty actions in

based on defendant's alleged failure to warn of dangers associated with smoking cigarettes. In that case the trial court directed a verdict in defendant's favor on the warranty claim, and the jury subsequently returned a verdict for the defendant on the negligence claim. On review, the Court of Appeals for the First Circuit held that the trial court erred in directing a verdict on the warranty claim, but, despite the error, a new trial was not warranted. *Kotler,* 926 F.2d at 1228, 1235. The Court determined that, under Massachusetts law, the only difference between the duty to warn under warranty and negligence theories is the level of knowledge attributed to a manufacturer: in warranty, the manufacturer is held to possess the knowledge of an expert and not simply, as in negligence, that of an ordinary, reasonable person. *Kotler,* 926 F.2d at 1232; *but see Simmons v. Monarch Machine Tool Co.,* 413 Mass. 205, 207 n. 3, 596 N.E.2d 318, 320 n. 3 (Mass.1992) (clarifying Massachusetts law concerning relevance of vendor's state of knowledge in warranty action).

The trial court in *Kotler* instructed on the negligence duty to warn, but mistakenly directed the jury to hold the defendant to the more demanding standard of expert knowledge associated with the warranty duty. Had the court instructed on the plaintiff's warranty claim, the jury would have been asked to apply that same standard of knowledge in determining warranty liability. The Court

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Massachusetts are analogous to and coextensive with strict liability actions in other jurisdictions that have adopted § 402A of the Restatement. *See Allen v. Chance Manufacturing Co.,* 873 F.2d 465, 466 n. 2 (1st Cir.1989); *Correia v. Firestone Tire & Rubber Co.,* 388 Mass. 342, 355, 446 N.E.2d 1033, 1039 (1983).

of Appeals concluded that the plaintiff in *Kotler* had not been prejudiced by the trial court's erroneous disallowance of the warranty claim because the jury's verdict for the defendant on the negligence claim presupposed an identical and consistent finding for the defendant on the warranty theory. *Kotler*, 926 F.2d at 1235. In other words, because the jury found no breach of the higher warranty duty to warn (albeit in the context of a negligence claim), such a finding would have necessarily precluded a verdict for the plaintiff on a warranty claim.

Under New Hampshire law, the strict liability duty to warn requires only that a manufacturer warn of *foreseeable* dangers associated with the normal or *foreseeable* use of its product. *See Chellman*, 138 N.H. at 78, 637 A.2d at 150; *Thibault*, 118 N.H. at 808, 395 A.2d at 846-47. "Foreseeability" is a negligence principle, determined by reference to what the manufacturer knew or should have known at a particular time. New Hampshire has yet to hold a manufacturer to a heightened state of knowledge concerning the dangers associated with its product. *Cf. Kotler*, 926 F.2d at 1232 (discussing "expert" and "perfectly developed" states of knowledge). A product may be unreasonably dangerous in the absence of a warning, but in New Hampshire a manufacturer is not strictly liable for failing to warn of the danger unless that danger is foreseeable. Issues of causation and harm being identical, under New Hampshire law the strict liability duty to warn appears to be indistinguishable from the negligence duty to warn.[3]

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[3] A strict liability failure-to-warn instruction was not included in the proposed jury instructions submitted to the

In this case, the jury instructions regarding Cheshire's negligence claim included a full explanation of the duty to warn. The negligence instructions also required the jury to hold the defendant to a standard of expert knowledge "concerning the health hazards associated with the asbestos contained in its fireproofing . . . and the materials and processes available to the industry." Jury Instructions, *supra*. The jury was further instructed that "[t]he defendant had a duty to test its fireproofing to see if it would release hazardous asbestos fibers during normal and foreseeable conditions of building use and maintenance." *Id.*[4]

Relying on these instructions, the jury found that W.R. Grace's failure to include a warning on its fireproofing did not constitute a breach of the negligence duty to warn of foreseeable dangers. Because the duty to warn relative to strict liability is identical to the duty to warn under negligence, and all other matters were resolved against plaintiff, the jury's verdict on the negligence count necessarily precluded a finding in plaintiff's favor

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court. *See* Plaintiff's Proposed Jury Instructions (document no. 151). Cheshire's counsel requested such an instruction for the first time at sidebar after the charge had been given to the jury, but did not suggest a particular formulation of the charge. Transcript, Nov. 2, 1993, at 110-11. In the absence of a proposed instruction from plaintiff, the court's own strict liability failure-to-warn instruction would have likely closely resembled the negligence duty-to-warn instruction had the court properly charged the jury on this issue following Cheshire's objection.

[4] By contrast, the jury charge in Chellman contained no references whatsoever to a duty to warn under any theory of liability.

with respect to the strict liability duty to warn. Accordingly, although it was error not to do so, Cheshire was not prejudiced by the court's omission of a failure-to-warn instruction relating to strict liability.[5]

B. Duty to Warn Standard

Cheshire also objects to the negligence duty-to-warn instruction given by the court. The jury was instructed that W.R. Grace had a duty to warn if it "knew or should have known that the fireproofing it sold to the plaintiff was dangerous to people or that it would damage property."[6] Jury Instructions (Court Exhibit no. 2) at 16. Cheshire insists that the court should have instructed that reasonable care required W.R. Grace to warn purchasers if and when it knew or should have known that its product "might be dangerous."

The standard Cheshire advocates lacks support in New Hampshire law. In *Thibault v. Sears, Roebuck & Co., supra,* the New Hampshire Supreme Court held that a

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[5] It may be worth noting that if it was reasonable (i.e., not negligent) for W.R. Grace not to place warnings on its product (as the jury determined), then any unreasonable danger that existed would appear to concern simply a deficiency in the design itself. *See Brochu v. Ortho Pharmaceutical Corp.*, 642 F.2d 652, 657 n. 6 (1st Cir.1981). Of course, the jury in this case also found that the design was neither defective nor unreasonably dangerous.

[6] The jury instructions defined "property damage" as a release of respirable asbestos fibers posing an unreasonable health risk. Jury Instructions (Court Exhibit no. 2) at 14.

manufacturer need not warn of all potential and speculative dangers associated with its product. *Thibault*, 118 N.H. at 808, 395 A.2d at 846-47 (manufacturer need not warn of known, but very unlikely, risk of danger). As discussed above, the duty to warn is limited under New Hampshire law to foreseeable dangers arising from foreseeable uses of the product.

The scope of a manufacturer's duty to warn is a function of its concomitant duties to acquire knowledge about the product and to test the product for defects. "Foreseeability" – i.e., what a manufacturer "knew or should have known" about the dangers of its product – is substantially determined by the knowledge a manufacturer "should have" acquired, and the tests it "should have" conducted. The instruction given by the court stated that W.R. Grace had a duty to warn of all dangers of which it knew or should have known. Subsequent instructions stated that W.R. Grace was deemed to possess the knowledge of an expert and was required to have adequately tested its fireproofing for non-obvious defects. According to these instructions, if the available scientific knowledge and testing had not revealed a particular danger, then the jury could not conclude that W.R. Grace "should have known" of such a danger or that it had a duty to warn consumers about it.

Cheshire argues that the instruction given mistakenly informed the jury that W.R. Grace was only required to warn of dangers that were "certain." This argument misses both the import of the court's instruction and the meaning of the word "danger." Something is "dangerous" if it has the *potential* to cause harm. A dangerous product is one that poses a *possibility* or *risk* of harm,

rather than a certainty of harm. By comparison, something "might be dangerous" if it *possibly* could have the *potential* to cause harm.

The jury in this case was not instructed that W.R. Grace had a duty to warn only of dangers that are "certain." Rather, the instruction imposed on W.R. Grace the duty to warn of *foreseeable risks of harm* to people or property – that is, "dangers" of which it "knew or should have known."[7] If it had been given, Cheshire's "might be dangerous" instruction would have erroneously implied that W.R. Grace was required to warn of all possible dangers, whether foreseeable or not. As has been discussed, New Hampshire law does not require a manufacturer to warn against such speculative risks. The court's instruction properly directed the jury's attention to those dangers that were foreseeable.[8]

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[7] The instructions cited by plaintiff from *Brochu v. Ortho Pharmaceutical Corp.*, 642 F.2d 652 (1st Cir.1981), and *Greenville v. W.R. Grace & Co.*, 827 F.2d 975 (4th Cir.1987), are consistent with this analysis. *See* Plaintiff's Motion for a New Trial at 9.

[8] This instruction is consistent with the "continuing duty-to-warn" instruction proposed by Cheshire which requires W.R. Grace to warn of any dangers that it "discovered" after the sale of the fireproofing. *See* Plaintiff's Proposed Jury Instructions No. 28; Jury Instructions (Court Exhibit no. 2) at 16.

C. Other Alleged Errors

Cheshire's final objections to the jury charge concern the court's failure to instruct on the New Hampshire statutes governing asbestos exposure levels as well as its failure to inform the jury that W.R. Grace's fireproofing must inevitably be removed from Cheshire's building.

The court specifically instructed the jury that the various state and federal statutes and regulations applicable to asbestos-containing material could not be considered in determining W.R. Grace's liability, but were relevant only to the nature and extent of plaintiff's damages. Jury Instructions (Court Exhibit no. 2) at 38-41. *See, e.g., Adams-Arapahoe School Dist. No. 28-J v. GAF Corp.*, 959 F.2d 868 (10th Cir.1992). Cheshire did not object to the court's instructions on this point. *See* Transcript, Nov. 2, 1993, at 107-31. Having decided the issue of liability in defendant's favor, the jury of course never reached the issue of damages. Consequently, even if error, plaintiff could not have been prejudiced by the court's omission of specific instruction on New Hampshire's statutes.

Cheshire also objects to the court's failure to instruct the jury that the federal NESHAP regulations required all of the asbestos-containing fireproofing to be removed upon demolition of the building and that such demolition was "inevitable." As an initial matter, the court did instruct the jury that the NESHAP regulations, about which the jury heard extensive testimony, "apply only when a certain amount of asbestos-containing material is disturbed or when a building containing such material is demolished." Jury Instructions (Court Exhibit no. 2) at 39.

Consistent with its instructions concerning the requirements of other regulations, the court permitted the jury to decide, based on the evidence, whether the building would in fact be demolished: "It is for you, as the finders of fact in this case, to decide what methods of dealing with the Monkote-3 fireproofing are reasonable under the circumstances and to calculate damages accordingly." *Id.* at 38. The jury was further instructed that if W.R. Grace were found liable for damages, Cheshire was entitled "to recover an amount that will fairly compensate it for all reasonable costs incurred to date or to be incurred in the future, in relation to the management, control, repair, or *removal* of the asbestos-containing fireproofing in its building." *Id.* (emphasis added).[9] In any event, this objection, too, is relevant only on the damages issue, which the jury never reached. Because the jury never reached the question of the "inevitability" of the fireproofing's removal, Cheshire could not have been prejudiced.

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[9] That *demolition* of this building is "inevitable" is not entirely free from doubt. *But see Greenville v. W.R. Grace & Co.*, 827 F.2d 975, 982 (4th Cir.1987). The building may be demolished twenty, fifty, or even one hundred years from now, or it may remain standing until time and decay reduce it to rubble. Mr. Frazier, the safety officer at Cheshire Medical Center, testified at trial that there were no current plans to demolish the building, and he declined to estimate the probable life of the building. *See* Transcript, Oct. 18, 1993 a.m. at 41-42. On such evidence, the jury would have had no basis for calculating the present value of the removal costs upon demolition at some unspecified future date.

III. Evidentiary Rulings

A. Fed.R.Evid. 611(b)

Cheshire next argues that the court improperly allowed W.R. Grace to question Cheshire witnesses during its case-in-chief relative to Grace's statute of limitations defense. Citing Fed.R.Evid. 611(b), Cheshire complains that defendant's "open cross" of its witnesses "allowed Grace to improperly divert the jury's attention away from Cheshire's case-in-chief and toward Grace's statute of limitations defense, forcing Cheshire to reshape its own case and to anticipate and defend against an issue that was prematurely allowed into evidence." Plaintiff's Motion for a New Trial at 20. This contention lacks merit.[10]

Rule 611(b) is clear:

> Cross-examination *should* be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court *may*, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

Fed.R.Evid. 611(b) (emphasis added). This general directive is suggestive rather than mandatory, and is subject to a trial judge's discretion regarding the proper scope of questioning. *See* Fed.R.Evid. 611(b), Advisory Committee's Note (citing cases). The Court of Appeals for this

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[10] Cheshire prevailed on the statute of limitations defense, so it was not directly prejudiced as to that matter. Cheshire argues, however, that the court's ruling prejudiced its liability case.

circuit has consistently recognized the broad discretion accorded trial judges in determining the scope of cross-examination. *See Losacco v. F.D. Rich Constr. Co.*, 992 F.2d 382, 385 (1st Cir.) ("Of course, trial judges, within their discretion, may disregard Rule 611(b)."), *cert. denied*, ___ U.S. ___, 114 S.Ct. 324, 126 L.Ed.2d 270 (1993); *United States v. Akitoye*, 923 F.2d 221, 225 (1st Cir.1991) (citing the "broad discretion accorded to federal trial judges in delimiting the scope of cross-examination"); *United States v. Keithan*, 751 F.2d 9, 11 (1st Cir.1984) ("It is axiomatic that the trial court is given wide discretion in controlling the scope of cross-examination."). Subdivision (a) of Rule 611 describes considerations relevant to the court's exercise of this discretion:

> The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

Fed.R.Evid. 611(a).

Cheshire's protestations notwithstanding, W.R. Grace was not allowed to conduct "open cross" of plaintiff's witnesses (i.e., cross-examination regarding any matter relevant to any issue in the case). In response to Cheshire's objection that W.R. Grace's anticipated cross-examination would cause extensive delay and would prejudice Cheshire's case, the court ruled as follows:

> I have no intention, Mr. Speights, of allowing the defendants to use the cross-examination to

> put their case in and charge you with that time. I'm going to charge that time to the defendants.
>
> But I think in ordering the proof and managing the trial in the most efficient way and the most comprehensible way for the jury, it makes sense to allow the defendants to cross-examine on the issue of statute of limitations, because it's a defense you are aware of. It's been moved on summary judgment at least twice that I'm aware of. It's not a surprise. All the witnesses are aware of it. To have the witnesses testify, limit cross, and then bring them back in the defendants' case is just an inefficient and ineffective use of resources.

Transcript, Oct. 8, 1993 a.m. at 56. The court further clarified this ruling by admonishing W.R. Grace's counsel not to "attempt to convert the witness to an expert for the defense." *Id.* at 106.

> In other words, I can't tell, Mr. Daniels, where you are going sometimes. If you are eliciting from him factual matters within his knowledge that reflect on some evidence later that you are going to tie into [what] they should have known in the 1970's, that's fine. But I don't want you to ask this witness if he has an opinion as to whether building owners, for example, in the 1970's should reasonably have known that asbestos in buildings posed a contaminant hazard.

Id. at 106-07. Thus, the court limited cross-examination to matters relating to the statute of limitations issue within the witness's knowledge and not to any other relevant matters.

The trial in this case lasted several weeks and involved many fact and expert witnesses. The parties' multiple theories of liability and defense compounded the complexity of the case, requiring the jury to apply difficult legal principles to complicated, often technical, evidence. Under these circumstances, the court finds that it was within its discretion to permit inquiry beyond the traditional strictures of cross-examination. In addition to promoting efficiency, the court's ruling was designed to facilitate the jury's comprehension of the evidence, without compromising effective presentation. *See supra.*[11]

Dicta cited by Cheshire from *MDU Resources Group, d/b/a Montana-Dakota Utilities Co. v. W.R. Grace & Co.*, 14 F.3d 1274 (8th Cir.1994), does not compel a different view. In that case, the trial judge contradicted a prior ruling and actively encouraged the defendant to explore its statute of limitations defense during the plaintiff's case-in-chief. Reversing the verdict for the defendant (on other grounds), the Court of Appeals for the Eighth Circuit remarked "by way of guidance" that "although the scope of cross-examination is within the discretion of the trial court, it should not be allowed to get out of hand." *MDU Resources*, 14 F.3d at 1282. It appears from the appellate court's characterization of the record in that case, and from Cheshire's own representations to this court about the *MDU Resources* trial, *see* Transcript, Oct. 8, 1993 a.m.

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[11] Early in this litigation the *defendant*, W.R. Grace, moved to bifurcate the trial so that the statute of limitations issue could be tried separately. *See* document no. 69. Although bifurcation would have eliminated Cheshire's current complaint, Cheshire objected strenuously to bifurcation, *see* document no. 72, and the motion was denied.

at 49, 55 (describing extensive delay resulting from "open cross"), that the cross-examination allowed here did not approach the broad inquiry which "[got] out of hand" in *MDU Resources*.[12]

Lis v. Robert Packer Hospital, 579 F.2d 819 (3rd Cir.), *cert. denied*, 439 U.S. 955, 99 S.Ct. 354, 58 L.Ed.2d 346 (1978), another case relied upon by Cheshire, is also distinguishable. The district judge in that case apparently permitted "open cross" as a general rule in *every* case, unless circumstances required otherwise. The Court of Appeals for the Third Circuit criticized that practice, emphasizing that Rule 611(b)

> does not confer upon a federal judge "the right to permit inquiry beyond the scope of the direct . . . in every case." Rather, the general prescription is precisely the opposite. Any right to counter the stated procedure is granted to the trial court only "in the exercise of discretion." To follow the practice announced by the trial judge in this case is not to exercise discretion; it is to use no discretion whatever.

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[12] The Eighth Circuit Court of Appeals further cautioned that when cross-examination goes beyond the scope of direct, the examiner must not ask leading questions of a non-hostile witness. *MDU Resources*, 14 F.3d at 1282. In this case, Cheshire does not object to the form of questions posed by counsel for W.R. Grace, nor did it make such an objection at trial. Cheshire confines its objections to the scope of cross-examination, not the mode of questioning.

Lis, 579 F.2d at 823. By contrast, the court's ruling on cross-examination here did not manifest a general practice, but constituted an exercise of discretion based on reasons unique to this particular case.

The question of discretion aside, examination of the record reveals that most of the cross-examination questions to which Cheshire objected on this ground actually fell within the scope of direct examination and did not implicate Fed.R.Evid. 611(b). In its motion for a new trial Cheshire specifically objects only to W.R. Grace's cross-examination of William Ewing, one of Cheshire's experts who testified during its case-in-chief and on rebuttal. Mr. Ewing, an industrial hygienist, testified as an expert regarding asbestos contamination of buildings and federal and state regulation of asbestos management and removal activities. During his initial cross-examination, counsel for W.R. Grace asked questions which, although relevant to the statute of limitations issue, also probed the witness's qualifications as an expert and the bases for his opinions, inquiry properly within the scope of direct examination. *See* Transcript, Oct. 8, 1993 a.m. at 91-92, 99-100, 167. Cheshire's other objections were either sustained by the court, *see id.* at 93, 111, or rendered moot due to Mr. Ewing's inability to answer the question, *see id.* at 114. Similarly, during cross-examination on rebuttal, Mr. Ewing either did not answer the allegedly objectionable question, *see* Transcript, Nov. 1, 1993 a.m. at 74, or the question properly concerned the bases for his opinion about the contamination of plaintiff's building, *see id.* at 75-77.

In these circumstances, Cheshire's assertions of "severe prejudice" from being "forced" to alter its "normal and successful strategy" lack merit. Cheshire has not demonstrated that it was prejudiced or that it is entitled to a new trial. *See Lis*, 579 F.2d at 824-25.

B. Videotape

Cheshire argues that it is entitled to a new trial because the court improperly excluded a videotape offered to rebut the testimony of defendant's witnesses, Thomas Feit and Richard Lee. The videotape showed the fireproofing in Cheshire's building being brushed with a toothbrush, purporting to illustrate the friable nature of the material. The tape was recorded on October 27, 1993, while trial was in progress and without notice to W.R. Grace. It was offered in evidence five days later on November 1, 1993, along with the testimony of Mr. Ewing to explain it. The court excluded the videotape on grounds that it was cumulative evidence. Transcript, Nov. 1, 1993 a.m. at 33-34.

Evidence may be introduced on rebuttal only to refute new facts brought out during the defendant's case-in-chief. *See Morgan v. Commercial Union Assurance Cos.*, 606 F.2d 554, 555 (5th Cir.1979). What constitutes proper rebuttal evidence is a matter committed to the discretion of the trial judge. *See Lubanski v. Coleco Industries, Inc.*, 929 F.2d 42, 47 (1st Cir.1991).

During its case-in-chief, the court afforded Cheshire wide latitude in demonstrating the fireproofing's friability to the jury. Using a toothbrush and tongue depressor, Mr. Frazier showed the jury how fireproofing

attached to a section of beam, which had been removed from plaintiff's hospital, broke down and presumably released fibers when disturbed. Transcript, Oct. 19, 1993 a.m. at 15-18. 63-67. Cheshire did not offer the beam in evidence.

After one of defendant's experts, Dr. Richard Lee, criticized that demonstration as unrepresentative of the material's characteristics, Transcript, Oct. 29, 1993 a.m. (I) at 10-11, the court allowed Cheshire to introduce bulk samples of fireproofing taken from its facility. Dr. Lee agreed that a more representative illustration of friability could be obtained using these samples. *Id.* at 37, 47-58; Transcript, Oct. 29, 1993 a.m. (II) at 5, 13-14. The jury was permitted to see and handle the bulk samples, under appropriate precautions.

Cheshire did not attempt to introduce a videotaped demonstration of friability during its case-in-chief, but argues that the tape was necessary on rebuttal in response to Thomas Feit's testimony that a videotape of the fireproofing intact in the hospital would provide the most representative demonstration of friability. The videotape was also expected to undermine Dr. Lee's remaining criticisms of the representative character of the bulk samples of fireproofing.

Cheshire's interpretation of the evidence is somewhat strained. The record shows that Mr. Feit testified only that a videotape would give the jury "a representation of what [the fireproofing] *looked like*" and that "[i]t would be like standing on the floor *looking up at it in person.*" Transcript, Oct. 25, 1993 a.m. at 7. He did not testify that the tape would be the best evidence of friability. In fact,

both Mr. Feit and Dr. Lee testified that the best way to evaluate the friability of the fireproofing in a courtroom setting would be to remove a very large section of the material, including the beam, such that disturbance of the fireproofing at the center of the section would be minimized. *See* Transcript, Oct. 25, 1993 a.m. at 5-6 (Mr. Feit); Transcript, Oct. 29, 1993 a.m. (II) at 15 (Dr. Lee).

Cheshire's proffered videotape was not proper rebuttal evidence because it did not counter any new evidence put forth by W.R. Grace. In any event, Cheshire introduced extensive evidence of the fireproofing's friability during its case-in-chief and during cross-examination of W.R. Grace's experts, rendering the videotape excludable on rebuttal as, at best, cumulative evidence of friability.[13]

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[13] *See also Fusco v. General Motors Corp.*, 11 F.3d 259 (1st Cir.1993) (exclusion of videotape demonstration where reenactment lacked sufficient similarity to accident at issue). Here it is also questionable whether a videotape of someone scrubbing fireproofing material with a toothbrush (presumably, with varying degrees of pressure and vigor) is particularly probative of the friable nature of the fireproofing relative to its release of asbestos fibers in the building during normal use and occupancy. While there was testimony about the possible bumping or banging of the fireproofing by maintenance personnel when working above the suspended ceiling, there was no evidence that anyone would likely be scrubbing it with any instrument like a toothbrush. The issue of significance regarding friability was whether the material was like "cement" ("locking in" respirable fibers) or whether it was "crumbly" (unstable and likely to release respirable fibers). The evidence admitted was fully adequate to allow the jury to determine the question and any more, even if probative, would have been cumulative.

IV. Conclusion

For the foregoing reasons, Cheshire's motion for a new trial (document no. 208) is denied.

SO ORDERED.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 94-1687

CHESHIRE MEDICAL CENTER,
Plaintiff, Appellant,

v.

W. R. GRACE & CO.,
Defendant, Appellee.

Before

Torruella, *Chief Judge*,
Selya, Cyr, Boudin, Stahl and Lynch,* *Circuit Judges*
and Keeton,**, *District Judge*.

ORDER OF COURT

Entered: May 17, 1995

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of this Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

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*Judge Lynch did not participate in the consideration or decision of this petition.

**Of the District of Massachusetts, sitting by designation.

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:

FRANCIS P. SCIGLIANO, CLERK.

By /s/ JANICE M. O'NEIL
Chief Deputy Clerk.

[cc: Messrs: Speights and Wiebusch]

NO. 94-1687

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

CHESHIRE MEDICAL CENTER

Plaintiff-Appellant

v.

W.R. GRACE & CO. AND W.R. GRACE & CO.-CONN,

Defendant-Respondents

On Appeal From a Judgment of the United States
District Court for the District of New Hampshire

APPELLANT'S PETITION FOR REHEARING AND SUGGESTIONS FOR REHEARING IN BANC

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I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the Supreme Court of the United States or the precedents of this Circuit and that consideration by the full court is necessary to secure and maintain uniformity of decisions:

1) *Memphis Community School District v. Stachura,* 477 U.S. 299 (1986);

2) *Newport v. Facts Concerts, Inc.,* 453 U.S. 247 (1981);

3) *Palmer v. Hoffman,* 318 U.S. 109 (1943);

4) *Duford v. Sears, Roebuck and Co.,* 833 F.2d 407 (1st Cir. 1987);

5) *Broderick v. Harvey,* 252 F.2d 274 (1st Cir. 1958).

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:

1) May this court refuse to decide whether or not an admittedly flawed charge warrants a new trial by *sua sponte* overruling the District Court's explicit holding that "counsel properly preserved the issue by timely objection"?

2) Does Fed.R.Civ.P. 51 require a party who distinctly states why it believes the failure to charge is error to further give a particular formulation of the omitted charge and additionally explain why the claimed error would warrant a new trial?

3) May this Court avoid plain error review when the District Court admits the instructional error and decides the merits?

INTRODUCTION

The District Court admitted that its failure to charge on strict liability for inadequate warnings "was indeed error," that Cheshire "properly preserved the issue by timely objection" and is "entitled to a new trial, on the strict liability count, if the error affected its substantial rights," but found that the error was harmless because the "jury's verdict on the negligence count necessarily precluded a finding in plaintiff's favor with respect to the strict liability duty to warn." *Cheshire Medical Center v. W.R. Grace & Co.*, 853 F.Supp. 564, 568-69 (D.N.H. 1994).[1]

Cheshire's primary challenge to this harmless error holding (no negligence means no strict liability) "never asked this Court to address the 'interesting' issue of whether or not strict liability and negligence differ on the duty to warn." Appellant Reply at 7. Cheshire instead argued that the jury as charged had to find for Grace if it found a duty to warn and reasonable care to warn, while the omitted charge allowed the jury to find for Cheshire if it found a duty to warn which Grace breached "although it exercised all possible care." Appellant Reply at 7.[2]

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[1] Exhibit A is the panel opinion; Exhibit B is the District Court's published decision; and the Addendum and Appendix Cheshire filed on appeal are cited, respectively, as "Add." and "App."

[2] Cheshire relied on *Kotler v. American Tobacco Co.*, 926 F.2d 1217, 1230-31 (1st Cir. 1990) (Selya, J.), *aff'd on remand* 981 F.2d 7 (1st Cir. 1992) which noted that the duty to warn in negligence and in Massachusetts warranty law (akin to strict liability) are similar, but held that inadequately provided warnings can be a breach of warranty even absent negligence. *Touch v. Master Unit Die Products, Inc.*, 43 F.3d 754, 757 (1st Cir. 1995) (Cyr, J.) recently

Cheshire secondly argued that the omitted strict liability charge was not harmless because the jury could have considered inadequate warnings in determining whether Grace's product was defectively designed.

Despite the District Court's explicit holding that the issue was "properly preserved by timely objection," the panel dismissed Cheshire's primary challenge with a four paragraph *sua sponte* holding that Cheshire's objection was not specific enough to preserve the issue. Ex. A at 22-23. In contrast, the panel spent over eleven pages on the second challenge, silently overruling *Duford v. Sears, Roebuck and Co.*, 833 F.2d 407, 411-412 (1st Cir. 1987) (Campbell, C.J.) and creating its own parade of disasters to refute bizarre arguments Cheshire never made. Ex. A at 10-21.[3]

In banc review is necessary because Cheshire's objection was much more specific than the mere exchange of case citations that *Memphis Community School District v. Stachura*, 477 U.S. 299, 305 n. 6 (1986) held was specific enough to satisfy Fed.R.Civ.P. 51, and because the panel ignored the plain terms of Rule 51 and altered the *Palmer v. Hoffman*, 318 U.S. 109, 119 (1943) requirement that an objection simply bring "into focus the precise nature of the alleged error" by also requiring that an objection give

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struck a similar distinction between negligence and strict liability under the RESTATEMENT (Second) OF TORTS.

[3] Cheshire, for example, never said anything about a manufacturing defect. Ex. A at 10-14. Cheshire relied on *Duford* to say that inadequate warnings may be considered in determining whether a product is defectively designed. Opening Brief at 21, 28; Appellant Reply Brief at 9.

a particular formulation of an omitted charge and further explain why the claimed error warrants a new trial.

In banc review is also necessary because the panel's eleven page discussion of the "cumulative effect of the evidence" and the "all factors" determination (Ex. A at 10-21) directly conflicts with the view of New Hampshire product liability law expressed in *Duford v. Sears, Roebuck and Co.*, 833 F.2d 407, 411-412 (1st Cir. 1987) (Campbell, C.J.).

In banc review is lastly necessary because the panel did not even perform the same plain error analysis on the admitted instructional error that the panel performed on another challenged instruction. Ex. A at 9. *Newport v. Facts Concerts, Inc.*, 453 U.S. 247 (1981) held that even an untimely objection still deserved review on the merits once the District Court has addressed the merits. Manifest injustice is thus the only term that aptly describes the panel's refusal to even decide whether or not the admittedly flawed charge warrants a new trial.

I. THE INSTRUCTIONS AND VERDICT FORM SHOW THAT THE DISTRICT COURT CLEARLY UNDERSTOOD CHESHIRE'S OBJECTION.

The panel *sua sponte* concluded that Cheshire's objection was not specific enough by construing it as a needless request to charge that Grace can be strictly liable if it is negligent:

> Plaintiff's request for instruction and objection to the charge, generously construed in plaintiff's favor were sufficient, we assume, to alert the

> trial judge to plaintiff's contention that a departure from ordinary prudence with respect to warning and instructions for use would render the product defective for the purpose of plaintiff's strict liability claim. In its denial of the motion for a new trial, the trial court conceded that it [sic] instruction had been error in this regard. Ex. A at 22.

To the contrary, the instructions and special verdict form the parties and the Court agreed to before the charge (Appellee Brief at 3 n. 2) clearly show that Cheshire objected because Grace can be strictly liable even if it is not negligent, not because it is negligent.

The District Court charged that negligence and strict liability were separate liability claims (Add. 31), that Cheshire was entitled to full compensation if the jury found for Cheshire on "any one" of its liability claims (App. 1834), but that Cheshire was not entitled to multiple recovery if the jury found for Cheshire on more than one claim. App. 1838. The verdict form that the parties and Court agreed to before the charge thus required that the jury fully compensate Cheshire if Grace was negligent, but did not allow further compensation if Grace was both negligent and strictly liable. Ex. A at 3-4 (citing special verdict form).

These instructions and verdict form show that when Cheshire objected it did not care whether the jury was instructed that "a departure from ordinary prudence with respect to warnings" would also render Grace strictly liable. Ex. A at 22. By that time everyone knew that Cheshire would get the same amount of damages if the

jury found any "departure from ordinary prudence" (negligence) whether Grace was strictly liable or not.

The liability instructions given and Grace's own proposed charges also show that everyone understood that Cheshire objected because Grace can be strictly liable without being negligent.

The District Court charged that Grace could be liable for inadequate warnings, but only if it failed to use reasonable care. After the charge that "[n]egligence is the failure to use reasonable care" (Add. 32), the Court instructed that

> If the defendant knew or should have known that the fireproofing it sold to the plaintiff was dangerous or that it would damage property, the defendant had a duty in the exercise of reasonable care to inform purchasers of the fireproofing of that danger. . . . Add. 32-33 (cited in 853 F.Supp. at 567).

In sharp contrast, the strict liability instruction correctly charged that a product in a "defective condition unreasonably dangerous" can render Grace strictly liable "although it has exercised all possible care in the preparation and sale of its product." Add. 34-35. The Court, however, failed to charge that inadequate warnings can be considered in determining whether the product is in such a condition. 853 F.Supp. at 567-568 (citing "unreasonably dangerous" charge).

After the jury was fully charged but before its deliberations, the Court stopped Cheshire's attempt to incorporate its earlier proposed charges and told Cheshire that "if it had an objection to the charge, I think you better

make it right here." App. 977. Cheshire did exactly what the Court directed and, as its first objection, Cheshire immediately raised the failure to charge that inadequate warnings can render Grace strictly liable:

> MR. SPEIGHTS: Your, Honor, we do not believe the Court charged that a – failure to warn can also make a product unreasonably dangerous, that it can be a defective and dangerous product under strict liability as well as a count in the negligence cause of action. A product may be unreasonably dangerous if it does not have an adequate warning. App. 977-78.

The only reason (indeed the only conceivable reason) Cheshire requested a warning charge "under strict liability as well as a count in negligence" (App. 977-978) was that the jury had already been charged that negligence requires the "failure to use reasonable care" (Add. 32) but that Grace could be strictly liable "although it has exercised all possible care." Add. 35. Grace certainly understood this same distinction well enough to propose a specific charge on its strict liability for inadequate warnings (App. 1946)[4] in addition to its proposed charges on negligent warnings. App. 1938-41; 1943-47.

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[4] Grace's request to charge strict liability for warnings read:

> In order to prevent a product from being unreasonably dangerous, the seller may be required to give a warning as to the possible dangers but only if it knew or should have known of these dangers at the time of the sale. . . . As with the plaintiff's negligence claim, W.R. Grace & Co. cannot be liable to Cheshire Medical Center if, at the time of the sale, it neither knew or should have known about possible dangers in its product. App. 1946.

At that point, the District Court could have easily cured Cheshire's objection. First, the Court could have given Cheshire's request to charge that "A product may be unreasonably dangerous if it does not have an adequate warning" and then repeated its earlier duty to warn charge without the reference to reasonable care. 853 F.Supp. at 567. The Court itself noted that two duty to warn charges would have "closely resembled" each other "had the court properly charged the jury following Cheshire's objection." 853 F.Supp. at 569 n. 3. Second, the Court could have given the request to charge that "A product may be unreasonably dangerous if it does not have an adequate warning" and then given the "may be dangerous" duty to warn charge Cheshire later requested (Ex. A at 6). Third, the Court could have even given the strict liability duty to warn charge Grace proposed. App. 1946 (cited in Petition at note 4). Once included in the strict liability instructions, any one of these alternative duty to warn charges would have cured Cheshire's objection by telling the jury that a duty to warn can be breached "although [Grace] exercised all possible care." Add. 35.

The District Court did not attempt to explore any cure because it overruled Cheshire's objection, holding that "the charge in general is a fair charge, is accurate, consistent with the law and covers many of the points you've raised at side bar." App. 985. The Court later admitted its error. 853 F.Supp. at 568.

II. THE DISTRICT COURT CONFIRMED THAT CHESHIRE SATISFIED FED.R.CIV.P. 51 WHEN IT EXPLICITLY HELD THAT CHESHIRE'S ERROR WAS PRESERVED.

The new trial pleadings and order verify the basis of Cheshire's objection and that it was properly preserved.

Cheshire's initial new trial memoranda confirmed the basis of its objection as clearly as humanly possible. It argued that, "Properly instructed, the jury could have found that Monokote's lack of an adequate warning rendered Grace strictly liable regardless of whether or not it used reasonable care." Citing *Allen v. Chance Mfg. Co.*, 873 F.2d 465 (1st Cir. 1989) (Campbell, C.J.),[5] Cheshire again stressed: "As instructed, the jury had to find that Grace was negligent to hold it liable for failing to adequately warn. Properly instructed, it did not." Docket 208 at 6-8. Cheshire's supporting reply again relied on *Allen*, addressed *Kotler*, and yet again stressed that strict liability exists "regardless of whether reasonable care has been exercised." Docket 214 at 7-8.

Given two chances to do so, Grace's responses to these pleadings never even hinted that the objection was not preserved. Grace argued the merits, saying that the failure to charge was not error and that *Kotler* showed that any error was harmless because the proposed strict liability charge was "materially equivalent" to the negligence charge. Docket 210 at 11-15; Docket 215 at 5.

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[5] After noting that Massachusetts warranty law is akin to strict liability, *Allen* held that inadequate warnings can be a breach of warranty absent negligence. *Allen*, 873 F.2d at 466 n. 2.

The District Court, who had more than a cold record to review and who was certainly familiar with Rule 51 – it cut Cheshire short when Cheshire tried to incorporate its earlier proposed charges ("I can't let you do that, Mr. Speights;" App. 977) – never suggested that it misunderstood Cheshire's objection, that it lacked an opportunity to correct the charge before jury deliberations, or that Fed.R.Civ.P. 51 was violated in any way.

Quite the contrary, the District Court devoted over two pages of its published decision explaining why its failure to charge "was indeed error," how the error was "properly preserved by timely objection," and why Cheshire was entitled to a new trial on its strict liability claim if the error was prejudicial. 853 F.Supp. at 566-68. The Court concluded:

> Because the instruction given did not specifically inform the jury that the manufacturer's failure to warn could be relevant to the existence of an unreasonably dangerous design defect, *Chellman* [*Chellman v. Saab-Scania AB*, 138 N.H. 73, 637 A.2d 148 (1993)] compels the conclusion that the court's omission of a strict liability failure-to-warn instruction was indeed error. Plaintiff's counsel properly preserved the issue by timely objection. Accordingly, Cheshire is entitled to a new trial, on the strict liability claim, if the error affected its substantial rights. 853 F.Supp. at 568.

The only reason the Court denied a new trial on the strict liability claim was that the Court accepted Grace's view of *Kotler* and spent over a page of its published decision explaining that it believed its admitted error was harmless because "the jury's verdict on the negligence

count necessarily precluded a finding in plaintiff's favor with respect to the strict liability duty to warn." 853 F.Supp. 568-69.[6]

This Court has repeatedly held that Rule 51 binds the District Court as firmly as the parties and that its purpose "is to give the trial judge an opportunity to correct any error before the jury retires to deliberate." *See, e.g., Transnational Corp. v. Rodio & Ursillo, Ltd.*, 920 F.2d 1066, 1069 (1st Cir. 1990). To *sua sponte* overrule the District Court's explicit holding that Cheshire "properly preserved the issue by timely objection" is to say that the District Court itself violated Rule 51, did not know what really happened at trial, and was incapable of giving a strict liability for inadequate warning charge upon request. The District Court deserves more respect.

In banc review is necessary because this record shows that the District Court clearly understood Cheshire's objection when it held that the issue was "properly preserved." 853 F.Supp. at 568. The record in *Memphis Community School District v. Stachura*, 477 U.S. 299, 305 n. 6 (1986) was much less specific.

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[6] This harmless error holding (no negligence means no strict liability) is the issue Cheshire appealed. It has absolutely nothing to do with whether there is strict liability if there is negligence, the objection the panel *sua sponte* said Cheshire made and the error the panel *sua sponte* said the District Court conceded. Ex. A at 22.

III. FED.R.CIV.P. 51 DOES NOT REQUIRE A PARTICULAR FORMULATION OF A REQUESTED CHARGE OR AN EXPLANATION OF WHY THE CLAIMED ERROR WARRANTS A NEW TRIAL.

Although the District Court did not allow Cheshire to incorporate its proposed charges into its objections (App. 977), it footnoted its observation that Cheshire did not include in its proposed charges a particular formulation of its requested strict liability charge. 853 F.Supp. at 569 n. 3.[7] While the District Court never suggested that this meant Cheshire's objection was not specific enough, and despite its explicit holding that the issue was "properly preserved by timely objection" (853 F.Supp. at 568), the panel latched onto this idea to *sua sponte* hold that Cheshire's objection was procedurally barred because it "proffered no form of instruction on duty to warn as part of the strict liability claim." Ex. A at 22.

Besides the common sense dictate that a party will not propose a solution for an error after the District Court disagrees that there is an error, Rule 51 does not require such a proffer. The rule's provision that a party "may" file such prior requests to charge shows that it is unnecessary, *Lear v. Equitable Life Assurance Society of the United States*, 798 F.2d 1128, 1133 (8th Cir.), *cert. denied* 479 U.S.

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[7] Grace noted this remark in a single phrase of its Appellee brief (at 2), but even on appeal never said that the error was improperly preserved. Grace instead repeated its no error arguments and, to further argue harmless error, relied exclusively on three sentences from a hornbook co-authored by the panel's author. Appellee Brief at 36. Cheshire's Reply noted that this view cannot be reconciled with New Hampshire and First Circuit law. Reply Brief at 8.

1066 (1987), and this Court has rejected a Rule 51 attack where no such proffer was made. *Broderick v. Harvey*, 252 F.2d 274, 276 (1st Cir. 1958).

The panel also seemed to hold that Cheshire's objection had to explain that Cheshire wanted a strict liability instruction precisely because the jury could find Grace strictly liable even if it was not negligent. Ex. A at 22. While this is the harmless error issue Cheshire raised on appeal, Rule 51 does not require an explanation of why an error would warrant a new trial any more than it requires a particular formulation of the proposed charge.

By its plain terms, all Rule 51 requires is that a party "state distinctly the matter objected to and the grounds of the objection," or, in the Supreme Court's words, that the party bring "into focus the precise nature of the alleged error." *Palmer v. Hoffman*, 318 U.S. at 119. In banc review is necessary to reconcile the panel's opinion with First Circuit and Supreme Court precedent.

IV. THE DISTRICT COURT HAD BEFORE IT AT LEAST THREE SPECIFIC FORMULATIONS OF GRACE'S DUTY TO WARN.

Even if such a proffer was necessary, the District Court had before it at least three specific proposals on Grace's duty to warn, including a strict liability charge Grace itself proposed. As noted above, the District Court could have simply deleted the six-word reference to reasonable care from the duty to warn charge it gave (853 F.Supp. at 567), given the duty to warn charge Cheshire later urged (App. 978), or even given the duty to warn charge Grace proposed. App. 1946. The point is that the

primary prejudice Cheshire suffered from the admittedly flawed charge has nothing to do with any particular duty to warn formulation. The primary prejudice has always been that the jury could have found Grace strictly liable for inadequate warnings "although it exercised all possible care." Appellant Reply at 8-9.

V. THE PANEL'S DECISION ON THE "CUMULATIVE EFFECT" AND "ALL-FACTORS" APPROACH IS IN DIRECT CONFLICT WITH CIRCUIT PRECEDENT.

Cheshire also argued that the admittedly flawed charge was prejudicial because a properly instructed jury could have found Grace strictly liable once it was told to consider the warnings' inadequacy along with the available, safer product designs. Opening Brief at 27-29; Reply Brief at 8-9.

This drew a lengthy discussion on why Cheshire implicitly requested "a surrender of judicial responsibility for instructing the jury to respect the law's outside limits on jury discretion." Ex. A at 15. Cheshire specifically dissociates itself from any such attempt, and is compelled to note that its view of New Hampshire law stands in good company.

In a decision on New Hampshire strict product liability law authored by Chief Judge Campbell and joined in by Judges Bownes and Torruella, this Court specifically held that the jury could consider the adequacy of the warnings "in conjunction with" available alternative designs:

> The jury might have based liability solely on the inadequacy of the warning, viewing the embossing as too small, the directions for proper installation unclear, or the instruction warnings as too general. **Alternatively, or perhaps in conjunction with a belief that the warnings were only marginally sufficient, the jury might have found that an available and reasonable alternative design . . . would have substantially reduced the product's dangerousness.**

Duford v. Sears, Roebuck and Co., 833 F.2d 407, 411-12 (1st Cir. 1987) (emphasis added). *Duford* also stands in good company – *Reid v. Spandone Machine Co.*, 119 N.H. 457, 463, 404 A.2d 1094, 1098 (1979) earlier held that a jury could find strictly liability once it coupled a design defect (placement of buttons on a machine) with the inadequate warnings.

Although Cheshire repeatedly cited *Duford* on appeal (Opening Brief at 21, 28; Reply Brief at 9), the panel's condemnation of a "cumulative effect" or "all factors" approach fails to even acknowledge this Court's directly conflicting decision. In banc review is necessary to reconcile the two.

VI. IN BANC REVIEW IS NECESSARY TO PERFORM A PLAIN ERROR ANALYSIS ON THE ADMITTED INSTRUCTIONAL ERROR.

Citing *Poulan v. Greer*, 18 F.3d 979, 982 (1st Cir. 1994), the panel performed a plain error analysis when it held that another instructional objection was insufficient (Ex. A at 9-10). The opinion, however, is significantly silent on

whether or not the instructional error the District Court admittedly made (853 F.Supp. at 568) is plain error.

Cheshire recognizes that plain error reversals are limited to those errors which have "seriously affected the fairness, integrity, or public reputation of judicial proceedings," *Morris v. Travisono*, 528 F.2d 856, 859 (1st Cir. 1976), but submits that this case is an even stronger case for plain error review than was *Newport v. Facts Concerts, Inc.*, 453 U.S. 247, 255-257 (1981). In *Newport*, the District Court addressed the claim of instructional error on its merits after it observed that the objection was untimely. *Id.* at 255. In this case, the District Court addressed the claim of error on its merits after it explicitly held that its failure to charge "was indeed error," that Cheshire "properly preserved the issue by timely objection," and that Cheshire is "entitled to a new trial, on the strict liability count, if the error affected its substantial rights." 853 F.Supp. at 568.

In these rare circumstances – where the District Court has explicitly held that the error it admittedly made was "properly preserved by timely objection" – *sua sponte* reliance on Rule 51 to avoid even deciding whether the admitted error was harmless does indeed affect this proceeding's fairness and integrity. It is truly manifest injustice to overrule the District Court's unappealed holding that Cheshire's objection was indeed preserved.

Even if Cheshire's objection was indeed bad, in banc review is still necessary to reconcile the panel's failure to perform a plain error review with *Newport* and *Poulan*.

At the very least panel rehearing is warranted so that the same plain error analysis the panel earlier performed

on Cheshire's other claim can be performed on the admitted error. Ex. A at 9-10.

CONCLUSION AND ALTERNATIVE REQUESTS FOR RELIEF

In banc rehearing or panel rehearing should be granted, the panel opinion vacated, and Cheshire granted a new trial on its entire strict liability claim so that the jury can consider whether or not inadequate warnings "in conjunction with" available alternative designs render Grace strictly liable. *Duford*, 833 F.2d at 411-12. Even the District Court recognized that this would be the proper remedy. 853 F.Supp. at 566 n. 1. Cheshire alternatively narrows its new trial request to a trial on its strict liability for inadequate warnings claim so that a jury can determine whether or not inadequate warnings render Grace strictly liable whether or not it departed from ordinary prudence.

Respectfully submitted,

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CERTIFICATION

I hereby certify that two copie [sic] of the foregoing Petition for Rehearing was mailed this 20th day of March, 1995 to Richard V. Wiebusch, Esquire, opposing counsel.

/s/ Michael P. Hall
Michael P. Hall, Esquire

* * *

[p. 110] question, it's perfectly proper. Just do so in writing by handing the note to the foreperson, whoever you elect, who will hand it to the court security officer, who will bring it to me.

But in that question it's very important that you not say, for example, we are divided on the issue of X by three to two or five to four or whatever the split might be, okay? That's what that means, but don't let anybody know your numerical division at any time. So it's very important that you not ever during the course of your deliberations let me or anybody else know what numerical division might exist within the jury on a particular issue.

All right. Counsel?

AT THE BENCH

MR. SPEIGHTS: Your Honor, we would incorporate our proposed instructions which the Court did not give as a part of our objections. In addition, your Honor –

THE COURT: No, no. I can't let you do that, Mr. Speights. If you have an objection to the charge, I think you better make it right here.

MR. SPEIGHTS: Your Honor, we do not believe the Court charged that a – that failure to warn can also make a product unreasonably dangerous, [p. 111] that it can be a defective and dangerous product under strict liability as well as a count in the negligence cause of action. A product may be unreasonably dangerous if it does not have an adequate warning.

In addition to that, your Honor, on the duty to warn under negligence, under the proposed charge once removed, your Honor proposed a charge that a duty exists if the plaintiff – if the defendant knew or should have known that the product might be dangerous, and in the final charge your Honor made it a certainty that the defendant knew or should have known that it was dangerous, and we don't think that's the proper standard. We don't think the defendant has to know with certainty. If the defendant knows that it might be dangerous, we believe that is sufficient to give a rise to a duty to warn.

Your Honor, the statute of limitations defense, we'd requested previously that the third prong of the test not be simply that asbestos fibers posed a health risk, but something else. The language I would propose, although there are several variations, would go to the injury that the plaintiff knew or should have known that it had been

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DEFENDANTS' INSTRUCTION NO. ___

A manufacturer has a duty to inspect and test its product. In addition, a manufacturer is bound to keep reasonably abreast of scientific knowledge and discovery in its field. However, just as it would be clearly unreasonable to hold Ford Motor Company to today's standard of scientific knowledge when determining liability for injury caused by a 1971 Mustang, so too it would be unreasonable to impose liability on W.R. Grace & Co. based on today's scientific knowledge and standards for sales of Monokote in 1971. W.R. Grace & Co. can only be held to the standard of expertise in the field at the time its product was manufactured and sold. In order to prevent a product from being unreasonably dangerous, the seller may be required to give a warning as to the possible dangers but only if it knew or should have known of these dangers at the time of sale. In this regard, you may consider that W.R. Grace & Co. put a warning in its product brochures informing architects and contractors about potential hazards. As with the plaintiff's negligence claim, W.R. Grace & Co. cannot be liable to Cheshire Medical Center if, at the time of the sale, it neither knew nor should have known about possible dangers in its product. *Heath v. Sears, Roebuck & Co.*, 123 N.H. 512, 530, 464 A.2d 288, 298-299 (1983); *Thibault v. Sears, Roebuck & Co.*, 118 N.H. 802, 807-808, 395 A.2d 843, 847 (1978).